Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

ALEJANDRO HERNANDEZ,

Petitioner,

v.

JESUS TERRONES, GUILLERMO MARTINEZ, ARTURO RUIZ, JR., ANTONIO TABULLO, JOE ZIMMERLY, AND PEDRO OCEGUEDA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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February 14, 2011

QUESTION PRESENTED

Whether a cause of action for the deprivation of liberty from continued, illegal detention requires a showing that the information that the police ignored or failed to investigate dispelled all evidence linking the wrongfully detained suspect to the crime?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those appearing in the caption to this petition and the City of El Paso, Texas

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alejandro Hernandez respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The decisions of the Fifth Circuit Court of Appeals, sought to be reviewed, Appendix ("App.") 1a-44a, and denying rehearing *en banc*, App. 101a-102a, are both unreported. The previous decision of the Western District of Texas, App. 45a-100a is reported at 662 F. Supp. 2d 596 (W.D. Tex. 2009).

JURISDICTION

The Fifth Circuit's opinion and judgment was entered on October 20, 2010. The Fifth Circuit's order denying rehearing was entered on November 15, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

U.S. Const. amend. IV.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Alejandro Hernnadez was wrongfully convicted of the murder of Robert Cobb and imprisoned for approximately 13 years before his exoneration. The district court found that evidence existed that would allow a jury to find that the Defendant-Respondent detectives violated Hernandez's constitutional rights by ignoring evidence of his innocence, withholding substantial exculpatory evidence, and coercing a witness to falsely identify him. This petition concerns the Fifth Circuit's reversal of the district court's denial of summary judgment and the attendant ruling that Hernandez could not sustain a constitutional claim for the pretrial deprivation of his liberty unless the exculpatory evidence ignored or withheld disposed of every shred of evidence linking him to the crime, no matter how tenuous.

In *Baker* v. *McCollan*, 443 U.S. 137, 144 (1979) the Court stated that a criminal suspect "could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards for the Fourth Amendment." To the contrary, "mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will, after the lapse of a certain amount of time, deprive the accused of 'liberty . . . without due process of law.'" *Id.* at 145;

see also *id.* at 148 (Blackmun, J., concurring). From this dicta, a number of circuits have recognized a claim for the wrongful pretrial deprivation of liberty where the police fail to act in the face of available and obvious exculpatory evidence. See *Russo* v. *City of Bridgeport*, 479 F.3d 196, 206-08 (2d Cir. 2007); *Pena-Borrero* v. *Estremada*, 365 F.3d 7, 13 (1st Cir. 2004); *Hayes* v. *Faulkner County*, 388 F.3d 669, 673-75 (8th Cir. 2004); *Lee* v. *City of Los Angeles*, 250 F.3d 668, 683-85 (9th Cir. 2001); *Wilson* v. *Russo*, 212 F.3d 781, 792 (3d Cir. 2000); *Armstrong* v. *Squadrito*, 152 F.3d 564, 576-80 (7th Cir. 1998); *Gray* v. *Cuyahoga County Sheriff's Dep't*, 150 F.3d 579, 582-83 (6th Cir. 1998); *Cannon* v. *Macon County*, 1 F.3d 1558, 1563 (11th Cir. 1993); *Sanders* v. *English*, 950 F.2d 1152, 1162 (5th Cir. 1992); *Gay* v. *Wall*, 761 F.2d 175, 178-79 (4th Cir. 1985). There is, however, discord among the circuits regarding what standard to apply in determining whether the exculpatory material possessed by investigators is sufficient to trigger a further duty to investigate.

The Fifth Circuit in this case joined the Fourth Circuit in restricting the investigators' duty to follow up on exculpatory leads to only those situations when the available information eliminates every thread of evidence tying plaintiff to the crime. App. 29a (citing *Sanders*, 950 F.2d at 1164); see also *Gay*, 761 F.2d at 178-79 (requiring release of pretrial detainee where the officer has "actual knowledge of innocence").

In contrast, the First, Third and Eleventh Circuits require more of investigators, each holding that an officer has a duty to act – and thereby, liability can be imposed for an officer's failure to do so – when he or she learns of exculpatory evidence that undermines probable cause. See *Brady* v. *Dill*, 187 F.3d 104, 123

(1st Cir. 1999) (Pollak, J. concurring) (finding that where an officer has ascertained beyond a reasonable doubt that probable cause is unfounded, he has a duty to act); *Thompson* v. *Olson*, 798 F.2d 552, 556 (1st Cir. 1986) (same); *Russo*, 212 F.3d at 792 (finding threshold to trigger duty to investigate exonerative evidence where additional information that officers receive "dispel[s] earlier probable cause"); *Cannon*, 1 F.3d at 1563 (finding that there is a "constitutional right to be free from continued detention after it was or should have been known that the detainee was entitled to release"). This standard does not require the complete absence of all evidence linking the plaintiff to the crime, but only the absence of probable cause. *Id.*

The Second and Eighth Circuits apply yet a third, standard, focusing on the conduct of the investigators, in addition to the materiality of the evidence ignored or withheld. See *City of Bridgeport*, 479 F.3d at 211-12; *Amrine* v. *Brooks*, 522 F.3d 823, 833-35 (8th Cir. 2008); *Wilson* v. *Lawrence County*, 260 F.3d 946, 955-57 (8th Cir. 2001).

Wrongful detentions prior to trial are all too common. They occur whenever an individual is arrested and the prosecution is terminated before trial or the individual is acquitted. In such cases, assuming (as will generally be true) probable cause supported the arrest when it occurred, no false-arrest claim can lie. But, because the plaintiff was not tried or was acquitted at trial, the plaintiff cannot raise claims, such as under *Brady* v. *Maryland*, 373 U.S. 83 (1963), for the denial of the right to a fair trial. See, e.g., *Mosley* v. *City of Chicago*, 614 F.3d 391, 397 (7th Cir. 2010) (observing that 6th, 9th, 10th and 11th circuits do not recognize a *Brady* claim when

trial results in acquittal). Moreover, many circuits do not recognize a claim for federal malicious prosecution. See *Castellano* v. *Fragozo*, 352 F.3d 939, 949-53 (5th Cir. 2003) (denying availability of federal malicious prosecution claim in the Fifth Circuit and reviewing circuits in which malicious prosecution claim is available). A claim that pretrial detention did not comport with due process, therefore, is the only way such wrongful detentions can ever be judicially reviewed. Such a claim is thus crucial to fill the gap in protection provided by claims for false arrest on the one hand, and for denial of a fair trial on the other.

This Court has never expressly ruled on the threshold for imposing liability for an investigator's failure to investigate or disclose exculpatory evidence. Given the lower courts' widely varying interpretations of *Baker*, and the importance of the right at issue, guidance is needed.

1. Based upon an investigation performed by the defendant detectives ("detectives") in the El Paso Police Department, Petitioner, Alejandro Hernandez, was wrongfully convicted in 1994 of a brutal murder that he did not commit. That investigation was demonstrably reckless: the detectives honed in on Petitioner based on an unsupportable hunch, and then manipulated the evidence to create a case against Petitioner rather than search for the real killer. To do so, the detectives coerced a witness to identify Petitioner; withheld from the prosecutors evidence that this witness recanted; withheld an exculpatory statement from another witness, which contradicted entirely the detectives' theory of the crime; and ignored a suspect whose fingerprints were found at the scene and who confessed to having

committed the murder. After spending approximately 13 years in prison, Petitioner was released when the Texas Court of Criminal Appeals reversed his conviction and the State dismissed all charges against him.

On May 11, 1994, the police discovered the body of Robert Cobb, a homeless veteran, lying beside his broken-down car near the north desert area of El Paso Texas. App. 49a. At approximately 2:30 a.m. on the night of the crime, Brandon Hamilton showed up at his neighbor Dee Baby Stewart's home carrying a knife and covered in blood. *Id.* Hamilton proceeded to confess to the murder of Cobb, narrating "the intricate details" of how he committed the crime. *Id.*

The next day the police found Cobb's body and began to investigate. To start, the detectives went to a strip mall near the crime scene; one of the store owner's told the detectives that Augustin Fabio Carreon, a neighboring business owner's stepson, was involved in gangs and was responsible for the graffiti on the back walls of the shopping center. *Id.* at 51a. The store owner, however, had no knowledge of the crime nor of Carreon's involvement in it. *Id.*

Detective Terrones examined the graffiti and was able to discern the alias "Gopy." *Id.* Detective Terrones checked to see if "Gopy" was a moniker for a known gang member but came up empty. Instead, Terrones learned that "Gory" – not "Gopy" – was an alias for Robert Reyes Hernandez (no relationship to the Petitioner). *Id.* at 52a. After searching through the El Paso records system, Terrones also discovered that the police had previously arrested Hernandez and Petitioner for attempting to shoplift a pair of jeans from a Mervyn's department store. *Id.* As the district court found, "[i]n light of this information"

and acting on a "hunch," "detective Terrones began drafting an affidavit seeking the arrest of [Petitioner] for Cobb's murder." *Id.*

To corroborate their wrongful inculpation of Petitioner, the police collected two pieces of patently false evidence. First, the police took a statement from Roland Echemendia, an alleged eyewitness who originally told the police that he did not know anything about the crime but later asserted that he witnessed it firsthand. *Id.* at 4a. Second, the police coerced Carreon into falsely confessing to the crime and identifying Petitioner as his accomplice. *Id.* at 52-55a, 77a. Carreon ultimately recanted this statement to the police and asserted that he did not even know Petitioner, but his recantation fell on deaf ears – even despite the fact that the detectives had independent evidence corroborating that Carreon and Petitioner had never met. *Id.* at 83a.

On that score, after Petitioner's arrest, the detectives finally spoke to Robert Reyes Hernandez the man who was the original Mervyn's department store "link" to Petitioner. Hernandez told the detectives that he knew both Petitioner and Carreon but that Petitioner and Carreon did not know each other. *Id.* at 89a-90a. Although the district court found that disclosure of this evidence would have "substantially reduced, if not obliterated" the value of Echemendia's eyewitness testimony, Hernandez's statement was not disclosed to the defense. *Id.* at 90a.

The day after Petitioner's arrest, the detectives learned about Hamilton's contemporaneous confession to the crime. Hamilton's neighbor, Dee Baby Stewart, contacted the police and reported Hamilton's statement to him. *Id.* at 56a. The district

court found evidence to support a finding that the detectives positively matched Hamilton's fingerprints to a previously unidentified latent print lifted from the crime scene. *Id.* Nonetheless, despite the inculpatory evidence suggesting Hamilton's involvement in the crime, the detectives released Hamilton without taking a statement from him or conducting any follow-up investigation into his guilt. *Id.* at 57a. Rather, "without performing any additional investigation on the case, the El Paso Police Department concluded their investigation into Cobb's murder." *Id.* at 57a.

Petitioner was subsequently convicted and sentenced to 99 years in prison. On June 21, 2006, after serving nearly 13 years in prison, the Texas Court of Criminal Appeals overturned Petitioner's conviction, and all charges against Petitioner were thereafter dismissed. *Id.* at 57a-58a.

2a. Although the district court acknowledged that, under *Baker*, once the police establish probable cause, they are not required to investigate every claim of innocence, the court nonetheless affirmed that "an officer may be exposed to liability under § 1983 if he deliberately ignores exonerative evidence or conducts a reckless investigation." App. at 82a.

The district court found that there was sufficient evidence of such culpable conduct in this case to warrant a trial. In particular, and in light of the very weak evidence connecting Petitioner to the crime, the district court found that the police officers' coercion of Carreon into confessing to the crime and identifying Petitioner as his accomplice violated Petitioner's due process rights. *Id.* at 82a-85a.

The district court also found that Hernandez's undisclosed statement that Petitioner and Carreon did not know each other would have torpedoed the value of Echemendia's testimony; therefore, the court held that the defendants failure to disclose it violated Petitioner's rights under *Brady*. *Id.* at 90a. Moreover, the court found that "the demise of Echemendia as a credible prosecution witness would have done more than just nullify his testimony; it would also have served to discredit generally the police methods employed in assembling the case against [Petitioner], calling into question the veracity of testimony of other prosecution witnesses." *Id.* at 91a. Finally, and for the same reasons, the district court held that Carreon's recantation and assertion that he had never met Petitioner would have substantially undermined Echemendia's testimony, which constituted the whole of the case against Petitioner. *Id.* at 92a-94a. Because that recantation was not disclosed, the district court found that the detectives had violated Petitioner's due process rights.

2b. On appeal, the Fifth Circuit reversed the district court. To start, the Fifth Circuit re-characterized Petitioner's claim as one for illegal detention arising under the Fourth Amendment – and not arising under the Due Process Clause of the Fourteenth Amendment. The Fifth Circuit then reasoned that Petitioner had not made out a claim under the Fourth Amendment because the evidence that the police ignored or withheld was not sufficient to eliminate all evidence tying Petitioner to the crime. *Id.* at 29a. In reaching that conclusion, the Fifth Circuit not only improperly rejected and rewrote the district court's findings of fact, *Gobert* v. *Caldwell*, 463 F.3d 339, 344 (5th Cir. 2006), but also failed to examine probable cause under the requisite totality

of the circumstances standard. *United States* v. *Thomas*, 627 F.3d 146, 159 (5th Cir. 2010). Instead, the Fifth Circuit isolated each piece of exculpatory evidence and determined – despite the district court's finding to the contrary – that Echemendia's statement that Petitioner and Carreon committed the crime remained unimpeached by each of the following: Hernandez's statement that Carreon and Petitioner did not know each other; Carreon's recantation and assertion that he did not know Petitioner; evidence that Carreon had been coerced in the first instance to make a false inculpatory statement; and by Hamilton's confession that he – and not Carreon and Petitioner – had committed the murder. App. 26a-29a. As a result, the Fifth Circuit reversed the district court and granted the defendants summary judgment. *Id.* at 29a-30a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision deepens the split of authority regarding how to treat claims for the wrongful pretrial deprivation of liberty in the aftermath of *Baker*. The courts have not only split on whether such claim arises under the Fourth or Fourteenth Amendment, but also and more importantly, about when the duty to investigate is triggered. The Fifth Circuit's approach – that the right to be free of illegal detention is violated only when the evidence that the officers receive eliminates any other evidence that might link Petitioner to the crime in any way, even if that evidence standing alone is insufficient for probable cause – is in tension with this Court's jurisprudence and fails to properly protect pretrial detainees.

1. As noted above, the courts have split over what standard triggers a duty on the part of police officers to investigate available, exculpatory evidence. The Fourth and the Fifth Circuits have held that a duty arises only when the evidence in question would eliminate all connections between the false suspect and the crime. In contrast, the First, Third and Eleventh Circuits suggest that the police duty is invoked when the information available to the police undermines probable cause. Finally, the Second and Eighth Circuits take a different approach, focusing on the misconduct of the police officers. See supra, at 3-4.

Either the probable cause inquiry or the police misconduct threshold is the appropriate standard to govern pretrial due process claims. In *Gerstein* v. *Pugh*, 420 U.S. 103, 120 (1975), this Court explained that the standard for probable cause to detain is the same as that for arrest. It would, therefore, be highly anomalous to require a higher threshold of proof to secure the release of an individual from detention (as a presumably innocent person awaiting trial) than that required for the initial detention.

Indeed, as *Gerstein* explained, pretrial detention involves a serious deprivation of liberty. "The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income and impair his family relationships." *Id.* at 114. Given those substantial burdens and the concomitant need to minimize erroneous pretrial detentions, there is no reason to depart from the probable cause standard; it strikes the proper balance between individual liberty and aggressive (and effective) law enforcement. Moreover,

requiring something more than probable cause contravenes this Court's longstanding jurisprudence and needlessly subjects individuals to deprivations of their individual liberty without cause. "It surely makes little sense to enforce limits on the police officer seeking out and detaining those whom he believes to have committed crimes without at the same time requiring adherence to procedures designed to ensure that the subject of the police action and detention is in fact the individual the officer believes he is." *Baker*, 443 U.S. at 153-54 (Stevens, J., dissenting).

Alternatively, the Second and Eighth Circuits' focus on the police officers' (mis)conduct provides a basis on which to root pretrial detainee due process claims. For example, the Eighth Circuit imposes liability for pretrial due process claims where an officer coerces a statement, withholds exculpatory evidence or otherwise ignores exonerating information. See, e.g., *Moran* v. *Clarke*, 296 F.3d 638, 648 (8th Cir. 2005) (*en banc*) ("evidence of 'questionable procedures, of pressures placed on officers to incriminate a specific person or corroborate the department's official line, of a hasty condemnation of [the defendant]' and proof that defendants had 'purposely ignored' exculpatory evidence" sufficient to establish a due process violation). To determine whether the coerced statement, withheld evidence or exculpatory information that was ignored is sufficiently important to impose liability, the courts have imported the relevance standard from the respective (and already developed) line of cases discussing the type of police misconduct – e.g., for claims of withheld evidence, the courts use the "materiality" standard developed in *Brady*.

Shifting the focus to the police officers' conduct provides a bright line that examines the totality of the investigation and evidence secured: Courts have repeatedly found that police coercion and other related misconduct bleeds over into and impugns the integrity of the entire investigation leading to a Petitioner's arrest. For example, in *Wilson*, the Eighth Circuit held that if "allegations about unlawful coercion are proved true, a reasonable factfinder could determine that Defendants acted recklessly or intentionally chose to force [the Petitioner] to confess instead of attempting to solve the murder through reliable but time consuming investigatory techniques designed to confirm their suspicions." *Wilson*, 260 F.3d at 957; *Lindsey* v. *King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (awarding a new trial to prisoner convicted in Louisiana state court because withheld Brady evidence "carried with it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling of the case"). By focusing on the misconduct of the police officers, this approach has the benefit of ensuring that honest police officers are not chilled in the execution of their duties for fear of being hauled into court. At the same time, however, such an approach makes certain that police officers cannot act with impunity. It also ensures the integrity of the entire criminal process: Judges and juries can make informed and intelligent subsequent determinations about the guilt or innocence of a defendant because the information placed before them has been properly secured. Thus, to the extent that *Baker* was concerned with the executive encroaching on the competency of the judiciary, the police misconduct standard actually ensures that the judicial officers can do their job because the judiciary will have all of the information

it needs to make a proper probable cause determination. *Baker*, 443 U.S. at 146.

The Fifth Circuit's approach provides none of the benefits of either the "probable cause" or the "police misconduct" standard. To start, the Fifth Circuit's standard – that the evidence obliterate any link between the Petitioner and the crime – is so demanding that it will almost never be met. For example, imagine that a suspect is arrested based on a purported eyewitness' identification and a fingerprint of the suspect's found at the crime scene. The police later learn that the eyewitness could not have been at the crime scene because he was not in the state at the time of the crime. Under the probable cause standard, this new information would be sufficient to trigger a duty to act because probable cause would be lacking. By the Fifth Circuit's standard, however, no such duty would arise until the fingerprint was somehow dispelled. But both *Kyles* and *Lindsey* admonish that due process is not a matter of arithmetic and the destruction of one piece of evidence – "even if the other remains untouched – may have consequences for the case far beyond the discrediting of [one witness'] testimony." *Lindsey*, 769 F.2d at 1042; see also *Kyles* v. *Whitley*, 514 U.S. 519, 535 (1995).

Likewise, the Fourth Circuit's attempt to couch the standard as requiring knowledge of a suspect's "actual innocence" is equally troublesome. "It is . . . impossible to subscribe to the wistful supposition . . . that police officers who must make conclusions from conflicting evidence gathered during a post-arrest investigation may come to 'know' that an arrestee is innocent." *Dill*, 187 F.3d at 112. Indeed, "[a]bsent personal knowledge" – i.e., the police officer is a

witness to the crime being investigated – the most that can be said is that a police officer "came to believe, with some degree of subjective certainty, that the man they arrested . . . was innocent of the underlying charge. This is not knowledge, but subjective belief." *Id.* Thus, the threshold adopted by the Fifth and Fourteenth Circuits for imposing a duty to act on exculpatory evidence is impossibly high.

2. This Court should also hear this petition because it addresses an important and recurring issue. The due process claim, the contours of which are at issue here, fills an important gap in constitutional protection. This is particularly true for individuals arrested pursuant to a facially valid warrant who are never brought to trial or who are acquitted at trial, but nonetheless wrongfully detained. Because there was probable cause for their arrest, there is no cause of action under the Fourth Amendment. Likewise, because the charges were dropped before trial or the defendant was acquitted at trial, claims for the violation of due process "trial rights" such as *Brady* are generally unavailable. See, e.g., *Mosley*, 614 F.3d at 397. Additionally, most circuits do not recognize a federal cause of action for malicious prosecution. See *Castellano*, 352 F.3d at 949-53.

Nor can these Petitioners seek safe harbor or be otherwise reassured by their speedy trial rights. See *Baker*, 443 U.S. at 244. "A speedy trial within the meaning of the Constitution may take place weeks or months – if not years – after the initial arrest." *Baker*, 443 U.S. at 154 (Stevens, J., dissenting). Thus, it is not a substitute for a more immediate challenge to wrongful pretrial deprivation. Rather, the only constitutional claim that remains for Petitioners

arrested pursuant to a valid warrant but never tried or acquitted is a due process right to be free from wrongful pretrial deprivation. *Wilson*, 260 F.3d at 956 n.8. Similarly, only if this type of liability exists will police officers be sufficiently incentivized to ensure that individuals are not wrongfully detained.

This is a claim that frequently recurs because of the large number of people that fall into the subset of individuals described above. For example, in 1990, the Bureau of Justice Statistics calculated that 31 percent of felony cases adjudicated resulted in acquittals or dismissals. Surrell Brady, "Arrests Without Prosecution and the Fourth Amendment," 59 Md. L. Rev. 1 (2000) at 38. Similarly, during the same timeframe, in King County, New York, "on average, only 33 percent of felony arrests . . . resulted in felony prosecutions. Even assuming that some of the felony arrests resulted in cases filed as misdemeanors, it is probable that more than half of the felony arrests still were not even charged." *Id.* at 38. Thus, there are a significant number of people for whom this due process claim and the behavior that it fosters among police (e.g., law enforcement to ensure that the proper person is arrested and detained) are a lifeline to vindicate the right to be free from unlawful detention.

* * * * *

In the end, numerous factors favor this Court's review. Given the Circuit split, there is a need to clarify the standard for imposing a duty on police to investigate and disclose exculpatory evidence so that a pretrial detainee is not unlawfully incarcerated. This is an important issue and right to be vindicated both because of the substantial liberty interests at stake and because of the large volume of arrestees for whom this claim and the attendant police behaviors it

requires is the only way to enforce their right to due process. Because this case presents an ideal vehicle to address the issue, this Court should grant Petitioner's writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 14, 2011

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT DATED OCTOBER 20, 2010

United States Court of Appeals,
Fifth Circuit

No. 09-50659
Oct. 20, 2010

Slip Copy, 2010 WL 4116737 (C.A.5 (Tex.))

(Not Selected for publication in the Federal Reporter)
(Cite as: 2010 WL 4116737 (C.A.5 (Tex.)))

Alejandro HERNANDEZ,

Plaintiff-Appellee,

v.

Jesus TERRONES, et al.,

Defendants-Appellants.

Before JONES, Chief Judge, PRADO, Circuit Judge, and OZERDEN*, District Judge.

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* District Judge, Southern District of Mississippi, sitting by designation.

Appendix A

PER CURIAM:**

Defendants Jesus Terrones, Guillermo Martinez, Arturo Ruiz, Jr., Antonio Tabullo, Joe Zimmerly, and Pedro Ocegueda take an interlocutory appeal from the district court's partial denial of their Motion for Summary Judgment in an action brought by Plaintiff pursuant to 42 U.S.C. § 1983. They argue that Plaintiff's due process claims are time-barred, and that they are otherwise entitled to qualified immunity on Plaintiff's § 1983 claims. We decline to exercise pendent jurisdiction over Defendants' statute of limitations defense, and dismiss this part of the appeal. Because we conclude that Defendants' actions did not violate Plaintiff's clearly established constitutional rights, we reverse the denial of their motion for qualified immunity, and remand to the district court for entry of summary judgment in favor of Defendants on Plaintiff's individual capacity § 1983 claims against them.

I. BACKGROUND

A. Factual Background

1. The Investigation

The undisputed facts, along with the relevant disputed material facts resolved in Plaintiff's favor, establish the following chain of events. On May 11, 1994, the body of Robert Cobb, a homeless Vietnam veteran, was

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** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

discovered in a desert area by officers of the El Paso Police Department. Cobb had been stabbed multiple times, and had suffered blunt force trauma to the head. His body was found next to his vehicle, a 1986 Pontiac Trans-Am automobile. El Paso Police Sergeant Pedro Ocegueda named Detective Jesus Terrones as the case agent to investigate Cobb's homicide.

On May 12, 1994, Detectives Terrones and Sal Dominguez[1] visited businesses located in a shopping center near the crime scene. The wife of one of the proprietors they interviewed advised that Augustin Fabio Carreon ("Carreon"), the stepson of another nearby business owner, was involved in gangs and was responsible for the graffiti on the back walls of the shopping center. Terrones inspected the graffiti and discerned the alias "Gopy," which he believed to be gang-related.

On May 13, 1994, Terrones contacted the El Paso Police Department's gang unit to see if "Gopy" was a moniker for a known gang member. He received information that "Gory," not "Gopy," was an alias for Robert Reyes Hernandez. Upon searching the El Paso Police Department's records management system, Terrones discovered that Robert Hernandez and Plaintiff Alejandro Hernandez, who are not related, had been arrested on a prior occasion for attempting to shoplift a pair of jeans at a Mervyn's department store. Detectives Terrones and Dominguez returned to the shopping center

1. Detective Dominguez was sued initially, but was later dismissed without prejudice from this case on October 27, 2008.

later that day, where they were approached by Roland Echemendia, an employee of a business located there. Echemendia informed the detectives that he had witnessed Cobb's murder. There is evidence that Echemendia had spoken to detectives previously, but had not mentioned that he had witnessed the murder.

At approximately 5:30 p.m. that same day, Detectives Guillermo Martinez and Arturo Ruiz, Jr., transported Echemendia to police headquarters, where he was interviewed and provided a statement. Echemendia related that at approximately 1:30 a.m. on May 11, 1994, he was standing outside the shopping center when he observed three males standing next to a Trans-Am located outside a nearby veterinary clinic. One individual was a white male with a beard and grayish-brown hair, who was wearing a striped square pattern shirt and blue pants. Echemendia identified the second male as Carreon, whom he had known for approximately three months, although only by sight. Carreon was the stepson of one of the owners of a shop located in the shopping center. Echemendia was unable to identify the third male by name, whom he described as a Latin male in his early twenties. Echemendia had seen Carreon and the Latin male together prior to the night of Cobb's murder. Echemendia provided a physical description of the Latin male and what he was wearing.

According to Echemendia, the three men appeared to be engaged in a drug transaction. He could see that the white male had a black bag filled with balloons, which he believed to contain heroin. He could hear Carreon tell the white male that he did not have money, but to give them

the merchandise. Carreon then pointed to the veterinary clinic and made a gesture as if to say someone was in the clinic. The white male told the other two men to get into the Trans-Am. Carreon sat in the front seat while the Latin male sat in the back seat. There was also a young female present who did not get into the car. The Trans-Am drove off at a high rate of speed and stopped in the same area where Echemendia saw the police the next day.

A short time later, Echemendia heard "moans and groans" coming from the vicinity of the vehicle. He then saw Carreon and the Latin male running in the dark. They ran under a street light, approximately four feet from Echemendia. Echemendia heard Carreon tell the Latin male "you killed him." The Latin male then told Carreon to give him his shirt. The Latin male had blood on his shirt and on his right hand. Echemendia later identified Carreon from a single photograph, and then identified Plaintiff from a six-person photographic lineup as the Latin male who was with Carreon that night.

That same day, May 13, 1994, police brought Carreon to headquarters, where Detective Antonio Tabullo interrogated him. Carreon initially maintained his innocence. Detective Tabullo confronted Carreon with Echemendia's accusatory statement, and at approximately 7:40 p.m. on May 13, 1994, Carreon signed a statement implicating himself and another man by the nickname of "Guero" in Cobb's death. At approximately 11:10 p.m., Carreon identified Plaintiff from a single photograph as "Guero," and signed an additional statement identifying Plaintiff as his accomplice. Carreon later testified, in

an affidavit submitted in connection with Plaintiff's Response to Defendants' Motion for Summary Judgment, that Detective Tabullo fabricated this confession and told Carreon that he would be released if he signed the statement. According to Carreon, Detective Ruiz placed a single picture of Plaintiff in front of him and instructed him that "[t]his is Mr. Hernandez. This is 'Guero,' just sign the back of the picture and we'll let you go...."

Earlier that day, May 13, 1994, Sergeant Ocegueda had dispatched officers, including Detective Joe Zimmerly, to pick up Plaintiff as a suspect in the murder. Detectives arrived at Plaintiff's residence, where he lived with his girlfriend, Laura Cortazar, and her sisters, at approximately 5:45 p.m. When detectives first arrived, neither Plaintiff nor Cortazar were at home. Cortazar's sisters told detectives that Cortazar went to pick up Plaintiff from his place of employment. The detectives initiated surveillance on the residence. Cortazar subsequently returned without Plaintiff. She advised detectives where Plaintiff was employed, and informed them that he would arrive home on foot by 7:00 p.m. A patrol unit went to Plaintiff's employment, and discovered that it closed at 5:30 p.m.

At 9:00 p.m., Detective Zimmerly, among other officers, obtained consent from Cortazar to search Plaintiff and Cortazar's bedroom. Detective Zimmerly discovered a pair of bloodstained boxer shorts in a white grocery bag. The boxers were taken as evidence. Detective Zimmerly then interviewed Cortazar and informed her of the investigation. She stated that she and Plaintiff had

been at home together on the night of May 10, 1994, and that she was not aware of Plaintiff leaving the house at any point that evening.

At 9:15 p.m., Plaintiff returned to the residence in a tan and brown van,[2] and was taken into custody by Detectives Zimmerly, Dominguez, and Martinez. At 11:30 p.m, Detective Tabullo interviewed Plaintiff, and Detective Zimmerly advised Plaintiff of the pending charges. Plaintiff told Detective Zimmerly that this was a case of mistaken identity, that he was at home on the night of May 10, 1994, and that he did not know Carreon. Both the police reports and Plaintiff's Second Amended Complaint indicate that Plaintiff's arrest occurred after Echemendia had provided his statement and identified Plaintiff, and after Carreon had confessed that he and 'Guero' were involved in Cobb's murder. However, it appears that Plaintiff was arrested before Carreon identified Plaintiff as 'Guero'.

Also on May 13, 1994, Detective Terrones drafted a complaint affidavit to obtain a warrant for Plaintiff's arrest. It stated, in part, that:

> probable cause and the facts to support the issuance of an arrest warrant are based upon the following: ... A witness has given a statement that says that he heard the defendant and

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2. Plaintiff's Second Amended Complaint relates that on the evening of Cobb's murder, two women heard noises coming from the desert and saw a tan van pull out of the desert and speed away.

> co-defendant arguing with Cobb. Cobb, the defendant, and co-defendant then got into Cobb's car and went to the desert area which is very close by. The witness heard moaning coming from the direction in which Cobb and the defendant's [sic] had gone. A short time later the defendant and co-defendant returned, on foot, to the area where the witness was and were talking about having done Cobb in.

The complaint affidavit indicated that, in addition to Echemendia's statement, it was based upon police reports and Carreon's statement that Plaintiff had stabbed Cobb with a pocket knife and struck him on the head with a metal object.

In the early morning hours of May 14, 1994, Detectives Terrones and Ruiz transported Carreon and Plaintiff to municipal court where they appeared before a magistrate judge. Plaintiff contends that while he was being transported with Carreon, Carreon recanted his identification of Plaintiff to Detectives Terrones and Ruiz. According to Plaintiff, Detective Terrones ignored Carreon, while Detective Ruiz told Carreon that he "can't change it anymore. That's something you're going to have to tell the judge." Based upon the complaint affidavit, the magistrate found probable cause existed for both Plaintiff's and Carreon's arrest and detention.

Later that day, Detectives Terrones and Zimmerly picked up Robert Hernandez as a suspect in the murder. Hernandez had been previously arrested and booked

into the county jail on May 11, 1994, on outstanding felony theft warrants. Hernandez agreed to an interview with Detectives Terrones and Zimmerly, and provided an alibi for his whereabouts on the night of May 10, 1994. According to police records, during the interview Hernandez was asked if he knew Plaintiff. Hernandez stated that he knew Plaintiff, and knew him to be a violent person who was involved with drugs. In a subsequent affidavit dated October 16, 2008, which Plaintiff submitted in connection with his Response to Defendants' Motion for Summary Judgment in this case, Robert Hernandez asserted that the detectives partially fabricated the report. He also testified that he told the detectives during this May 14, 1994, interview that he "knew both [Plaintiff] and [Carreon] but [he] knew for a fact that [Plaintiff] and [Carreon] did not know each other." Assuming Hernandez did in fact make this statement, Detective Zimmerly did not include it in the police report.

After the interview with Hernandez, the detectives proceeded to Hernandez's parents' house, where his mother was able to corroborate his alibi. The detectives searched Hernandez's room, where they found a pair of shoes which tested negative for any evidence linking Hernandez to the murder. The police reports indicate that detectives also checked the clothing and shoes Hernandez wore at the time he was booked at the county jail on May 11, 1994, again with negative results.

Also on May 14, 1994, Sergeant Ocegueda received a telephone call from Dee "Baby" Stewart, who advised that a man named Brandon Hamilton had bragged to

him about having committed Cobb's murder. Hamilton was located and brought to police headquarters that same day for an interview. Hamilton denied involvement in the murder, but admitted that he had spoken with Cobb a day or two prior to the murder when Cobb had tried to sell Hamilton some items from his car. Hamilton acknowledged that he had touched some of the items in Cobb's car, as well as the outside of Cobb's car on the passenger side. Police obtained Hamilton's fingerprints, and released him without taking a statement. Two days later, police learned that Hamilton's fingerprints were a positive match with latent fingerprints, which, according to Plaintiff, were found on the car.

Police did not obtain a formal statement from Stewart until May 27, 1994. According to Stewart, he was in his apartment on the night of Cobb's murder when Hamilton, his neighbor, stopped by at approximately 2:15 a.m. Stewart observed that Hamilton was breathing hard, his shoes were covered in mud, and his hands and a small pocket knife he was carrying were covered in blood. Hamilton allegedly told Stewart that he "wasn't going to believe it, but [he] just killed somebody." Hamilton then related the details of Cobb's murder to Stewart, which Plaintiff maintains were corroborated by Cobb's autopsy and toxicology reports. According to Plaintiff, Defendants never sought permission to search Stewart's apartment for evidence that could substantiate Stewart's claims that Hamilton entered his apartment with Cobb's blood on him.

A few days later, on June 3, 1994, police arrested Hamilton on an unrelated theft charge, and Detective

Dominguez obtained a formal statement detailing Hamilton's encounter with Cobb. According to Hamilton, he went to Stewart's house the following Sunday, approximately five days after Cobb's murder, with a newspaper. The two discussed the murder, which by then had been reported in the media. He again denied having committed Cobb's murder. Hamilton agreed to provide body fluid and blood samples at a later date. He was then returned to patrol officers for booking on the theft charge. Plaintiff argues that Defendants never took any additional action to search Hamilton's apartment. The police reports indicate, however, that a week later, on June 10, 1994, Detective Dominguez transported Hamilton to a medical center, where Hamilton provided body fluid and blood samples, which were submitted for testing.

2. The Criminal Trial Proceedings

An examining trial was held on May 24, 1994, to determine whether there was sufficient probable cause to turn Plaintiff's case over to the grand jury. At the outset, the magistrate judge acknowledged that, as he learned through his discussions with Plaintiff's criminal defense counsel and the prosecuting attorney, Plaintiff intended to call Carreon as a witness for the purpose of repudiating his identification of Plaintiff as a co-participant in the murder. Carreon invoked his Fifth Amendment right not to testify. Plaintiff's counsel brought the court's attention to the Sixth Amendment right to confront witnesses, as well as the portion of the complaint affidavit stating that probable cause to arrest Plaintiff was based in part on the "voluntary statement of the accused," Carreon. The

magistrate judge assured Plaintiff's counsel that the prosecution was "going to have to present some other evidence" aside from the complaint affidavit, and that if the prosecution did make use of Carreon's identification of Plaintiff, then Plaintiff would have a right to confront Carreon.

In the end, Carreon's identification of Plaintiff was never introduced at the examining trial, and Carreon never testified at that proceeding. Plaintiff voluntarily testified at the hearing, and claimed that he did not know Carreon. Based upon Detective Terrones' testimony describing the crime scene and Echemendia's eyewitness testimony, the magistrate judge found that there existed sufficient probable cause to turn the case over to the grand jury. The grand jury indicted Plaintiff for Cobb's murder on June 14, 1994.

Plaintiff's criminal trial commenced on October 17, 1994. Carreon again invoked his Fifth Amendment right not to testify, and his identification of Plaintiff was never introduced at the trial. Laura Cortazar, Fernando Antonio Garinian, who was a friend of Carreon, and Plaintiff himself, all testified to the effect that Plaintiff and Carreon did not know each other. Echemendia also testified at the trial consistent with the statement he had given the police. The jury convicted Plaintiff of Cobb's murder on October 19, 1994, and he was sentenced to serve ninety-nine years in prison. After serving nearly thirteen years of his sentence, Plaintiff obtained habeas corpus relief on grounds of ineffective assistance of counsel. His conviction was overturned, and all charges against him were eventually dismissed.

B. Procedural History

Plaintiff filed his Complaint in this case on June 20, 2008, against several El Paso police officers under 42 U.S.C. § 1983, seeking damages for violations of his Fourteenth Amendment due process rights based upon his allegedly wrongful arrest, prosecution, and conviction. Plaintiff also asserted claims for conspiracy under both state law and 42 U.S.C. § 1985, as well as a § 1983 claim against the City of El Paso. Plaintiff's specific § 1983 claims against the individual Defendants, Detectives Jesus Terrones, Guillermo Martinez, Arturo Ruiz, Jr., Antonio Tabullo, Joe Zimmerly, and Sergeant Pedro Ocegueda, were ones for false arrest, malicious prosecution, illegal detention, and wrongful conviction, and for constitutional violations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Plaintiff argued that Defendants violated his procedural due process rights by manipulating identification evidence, conducting impermissibly suggestive identification procedures, manipulating the outcome of the murder investigation, deliberately failing to investigate, concealing and intentionally failing to recover and develop materially exculpatory information and evidence, making a false determination of probable cause, and manipulating eyewitness identification evidence by use of threats and coercion. Defendants moved for summary judgment, on grounds that Plaintiff was judicially estopped from asserting his claims, that his Fourteenth Amendment due process claims were time-barred, that Defendants were otherwise entitled to qualified immunity on Plaintiff's

§ 1983 claims, and that Plaintiff had failed to adduce sufficient evidence in support of his conspiracy claims.

The district court classified Plaintiff's claims as ones for employing impermissibly suggestive identifications, conducting a reckless investigation, and violating Plaintiff's rights under *Brady*. The district court concluded that these claims were not time-barred, and that Plaintiff was not judicially estopped from asserting them. The district court denied qualified immunity to the individual Defendants on Plaintiff's reckless investigation claim, on grounds that Plaintiff had adduced evidence creating fact questions that Defendants had "hectored" Carreon into identifying Plaintiff as his accomplice, and later ignored Carreon's recantation of that identification. The district court found that Plaintiff stated a constitutional deprivation based upon an allegedly unduly suggestive identification procedure employed with Carreon, but granted qualified immunity on Plaintiff's claim of impermissibly suggestive identification as it related to the procedure used in connection with Echemendia's identification of Plaintiff. The district court further denied qualified immunity on Plaintiff's claim pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), concluding that Defendants had failed to disclose exculpatory evidence. The district court grounded its denial of qualified immunity on the presence of material disputes of fact as to Plaintiff's allegations on these claims. The district court dismissed Plaintiff's § 1985 and state law conspiracy claims.

Defendants now take an interlocutory appeal, arguing that Plaintiff's due process claims are time-

barred, and that they are otherwise entitled to qualified immunity on Plaintiff's remaining § 1983 claims for constitutional violations associated with: (1) the alleged reckless investigation conducted by Defendants based upon their "hectoring" Carreon into identifying Plaintiff as an accomplice, failing to record Robert Hernandez's statement that Plaintiff and Carreon did not know each other, and failing to investigate Hamilton as a potential suspect; (2) the alleged unduly suggestive identification procedure used with Carreon in his identification of Plaintiff as an accomplice; and (3) the alleged *Brady* claims pertaining to the non-disclosure of Robert Hernandez's statement, the "hectoring" of Carreon into confessing and identifying Plaintiff as an accomplice, and Carreon's recantation of that identification.

II. JURISDICTION AND STANDARD OF REVIEW

A. Jurisdiction

"District court orders denying summary judgment on the basis of qualified immunity are immediately appealable under the collateral order doctrine, notwithstanding their interlocutory character, when based on a conclusion of law." *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir.1997) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). "[W]e are restricted to determinations of questions of law and legal issues, and we do not consider the correctness of the plaintiff's version of the facts." *Id.* (quoting *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 251-52 (5th Cir.2005)). We review only "whether the district court erred in assessing the legal significance of the conduct that the

district court deemed sufficiently supported for purposes of summary judgment." *Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir.2004); *see also Meadours v. Ermel*, 483 F.3d 417, 422 (5th Cir.2007) ("In other words, we may only review the district court's conclusion that issues of fact are material (a legal question), but we may not review the conclusion that those issues of fact are genuine (a fact question)."). "Where factual disputes exist in an interlocutory appeal asserting qualified immunity, we accept the plaintiffs' version of the facts as true." *Kinney*, 367 F.3d at 348.

B. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure states that the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56. The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Meyers v. M/V Eugenio C.*, 842 F.2d 815, 816 (5th Cir.1988).

The mere existence of a disputed factual issue does not foreclose summary judgment. "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309,

316 (5th Cir.2004) (quoting *Hanchey v. Energas Co.*, 925 F.2d 96, 97 (5th Cir.1990)). "With regard to 'materiality,' only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment." *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 272 (5th Cir.1987). Where "the summary judgment evidence establishes that one of the essential elements of the plaintiff's cause of action does not exist as a matter of law, ... all other contested issues of fact are rendered immaterial." *Topalian v. Ehrman*, 954 F.2d 1125, 1138 (5th Cir.1987).

III. ANALYSIS

A. Defendants' Statute of Limitations Defense

Defendants argue that the district court erred in determining that Plaintiff's Fourteenth Amendment due process claims were not barred by the statute of limitations. Defendants' theory is that these claims are related to false arrest claims under the Fourth Amendment, which are subject to a two year statute of limitations commencing at the time a claimant becomes detained pursuant to legal process. In *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Supreme Court held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Enlow v. Tishomingo Cnty., Miss.*, 962 F.2d 501, 508 (5th Cir.1992). However, "[t]he Supreme Court has been reluctant to endorse the exercise

of pendent appellate jurisdiction over rulings that, while being related to the denial of qualified immunity, are not themselves independently appealable prior to judgment." *Cantu v. Rocha*, 77 F.3d 795, 805 (5th Cir.1996) (citation omitted). Because the denial of a statute of limitations defense is not immediately appealable, this Court may consider it only if it exercises pendent jurisdiction. *Aldy on Behalf of Aldy v. Valmet Paper Machinery*, 74 F.3d 72, 75 (5th Cir.1996) ("the denial of summary judgment on the grounds of a statute of limitations is neither a final order ... nor does it fit within that small category of claims subject to immediate appeal ...").

"Pendant [sic] appellate jurisdiction is only proper in rare and unique circumstances where a final appealable order is 'inextricably intertwined' with an unappealable order or where review of the unappealable order is necessary to ensure meaningful review of the appealable order." *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453 (5th Cir.1998). Although we did so in an unpublished opinion, we have determined on at least one occasion that a statute of limitations defense is not "inextricably intertwined" with the denial of qualified immunity, so as to give rise to pendent appellate jurisdiction. *Jackson v. Mitchell*, 54 Fed. App'x 794, at *1 (5th Cir.2002). Other circuits have reached the same conclusion. *See Bryson v. Gonzales*, 534 F.3d 1282, 1285-86 (10th Cir.2008) (finding that "timeliness issues" were not "'inextricably intertwined' with the qualified immunity issue nor necessary to 'meaningfully review' it."); *Triad Assoc., Inc. v. Robinson*, 10 F.3d 492, 497 n. 2 (7th Cir.1993) ("[W]e do not find that these collateral issues are 'inextricably

entwined' with the appealable qualified immunity inquiry nor that there are 'compelling reasons' for not deferring the limitations questions until the end of the lawsuit that would justify our invoking our rarely appropriate pendent appellate jurisdiction.").

Based on the foregoing, we conclude that we lack jurisdiction over the district court's denial of summary judgment on the statute of limitations defense, and do not reach the merits of this claim.

B. Plaintiff's Individual Capacity § 1983 Claims

1. 42 U.S.C. § 1983 and Qualified Immunity

42 U.S.C. § 1983 imposes liability upon any person who, acting under color of state law, deprives another of federally protected rights. 42 U.S.C. § 1983. Section 1983 affords a remedy to those who suffer, as a result of state action, deprivation of rights, privileges, or immunities secured by the Constitution and the laws of the United States. *White v. Thomas*, 660 F.2d 680, 683 (5th Cir.1981). A plaintiff cannot succeed on a § 1983 claim merely by showing any deprivation of his rights; § 1983 was intended to preserve rights protected by federal law. *Wright v. Collins*, 766 F.2d 841, 849 (5th Cir.1985).

"Qualified immunity balances two important interests-the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v.*

Callahan, ---U.S. ----, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia*, 305 F.3d 314, 322 (5th Cir.2002) (citing *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 489 (5th Cir.2001)). This burden cannot be discharged by conclusory allegations and assertions. *Michalik v. Hermann*, 422 F.3d 252, 262 (5th Cir.2005).

Evaluating a claim of qualified immunity involves two inquiries: (1) whether the plaintiff has alleged a violation of a constitutional right; and (2) whether that right was clearly established at the time of the alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), *overruled in part by Pearson*, ---U.S. ---, 129 S.Ct. 808, 172 L.Ed.2d 565. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Wernecke v. Garcia*, 591 F.3d 386, 392 (5th Cir.2009) (citations omitted). A defendant will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that the defendant's actions were lawful; but if officers of reasonable competence could disagree on the issue, immunity should be recognized. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). It is within the discretion of the district court to decide which of the two prongs of the qualified immunity analysis to address first in light of the circumstances of

each case. *Pearson*, 129 S.Ct. at 818. Each defendant's actions must be evaluated individually in the qualified immunity context.[3] *Meadours v. Ermel*, 483 F.3d 417, 421-22 (5th Cir.2007).

"The scope of clearly established law and the objective reasonableness of those acts of the defendant that the district court found the plaintiff could prove at trial are legal issues we review *de novo*." *Thompson v. Upshur Cnty.*, 245 F.3d 447, 456 (5th Cir.2001). Where, however, the district court denies a motion for summary judgment on the basis of qualified immunity simply because "fact issues" remain, this Court may "either scour the record and determine what facts the plaintiff may be able to prove at trial and proceed to resolve the legal issues, or remand so that the trial court can clarify the order." *Id.*

2. Defendants are Entitled to Qualified Immunity on Plaintiff's Fourteenth Amendment Claim for Conducting a Reckless Investigation

The district court denied qualified immunity on this claim, reasoning that an official may be exposed to liability under § 1983 if he deliberately ignores exonerative evidence or conducts a reckless investigation. Because

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3. Although courts ought to analyze each defendant's actions separately to determine the entitlement to qualified immunity of each, we find it unnecessary to do so in this case because of our conclusion that none of Plaintiff's claims are legally cognizable or raise a genuine, material fact issue which could disentitle any of Defendants, whatever their precise involvement in the investigation, from qualified immunity.

Plaintiff had adduced evidence that, if accepted as true, would establish that Carreon was pressured into implicating Plaintiff as his accomplice, and because there was evidence that Defendants ignored Carreon's recantation of his identification of Plaintiff, the district court concluded that, resolving all factual disputes in Plaintiff's favor, he had stated a cognizable claim for a violation of his rights based on a reckless investigation. At oral argument, the parties disputed whether there exists in this Circuit a clearly established constitutional right to be free from a reckless investigation.

To determine whether a specific claim states the violation of a constitutional right, we have held that "[s]uch claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C. § 1983." *Castellano v. Fragozo*, 352 F.3d 939, 953-54 (5th Cir.2003) (en banc) (finding no freestanding constitutional right to be free from malicious prosecution). In *Sanders v. English*, 950 F.2d 1152 (5th Cir.1992), we recognized that police officers may be liable for illegal detention under § 1983 for deliberately ignoring exonerative evidence or conducting a reckless investigation. *Sanders*, 950 F.2d at 1162. *Sanders* did not recognize an independent constitutional claim for being subjected to a reckless investigation; instead, it acknowledged that conducting a reckless investigation could support other claims for violations of established constitutional rights. In that case, we reversed the grant of summary judgment to the defendant officer on plaintiff's claim for illegal detention, not reckless investigation. We explained that:

> the plaintiff ha[d] come forward with evidence which, if credited by the fact-finder, would establish that the defendant knowingly and willfully ignored substantial exculpatory evidence. A fact-finder reasonably could conclude that Lt. McCoy deliberately looked the other way in the face of exonerative evidence indicating that he had arrested the wrong man: three alibi witnesses deemed credible by Lt. McCoy, a negative identification by one of the witnesses who helped compose the police sketch, and a belated identification by the victim under peculiar circumstances. Lt. McCoy's deliberate failure to disclose this undeniably credible and patently exculpatory evidence to the prosecuting attorney's office plainly exposes him to liability under § 1983.

Id. at 1162 (citing *Geter v. Fortenberry*, 882 F.2d 167 (5th Cir.1989) (*Geter II*)). We found that, under the circumstances, "a jury could find that if Lt. McCoy had disclosed the exculpatory evidence to the prosecuting attorney's office, Sanders would have been released and the charges against him dropped long before they were." *Id.* This supported Sanders' claim, which was one for illegal detention, not reckless investigation. *See id.*

Plaintiff urges that the facts of this case are akin to those in *Sanders*, such that Defendants are not entitled to qualified immunity. He contends in his supplemental brief that "[w]hile *Sanders* described liability for conducting a reckless investigation under the rubric of 'illegal

detention,' this is a distinction without a difference. Labels do not control." Indeed, the plaintiff in *Sanders* classified one of his causes of action as one for negligent investigation. *Id.* at 1158 n. 10.

This Court instead characterized Sanders' claim, based on the facts alleged in the Complaint and those adduced during discovery, as being "not merely one for *negligent* investigation leading up to the arrest; the claim is also one for illegal detention based on the officers' *deliberate* failure to recognize, investigate, and disclose patently exonerative evidence which surfaced immediately following the arrest." *Id.* (emphasis in original). We did not hold that the negligent investigation and ignoring of exculpatory evidence in *Sanders* were freestanding constitutional violations, rather, they were conduct supporting Sanders' claims for false arrest and illegal detention. In sum, we conclude that there was no freestanding, clearly established constitutional right to be free from a reckless investigation at the time of the events alleged in the Complaint.

Even if we re-characterize this claim as one cognizable under § 1983, such as for false arrest[4] or illegal detention (the rights at issue in *Sanders*), we cannot reach the same conclusion *Sanders* did under the facts of this case, even resolving those facts in Plaintiff's favor. In *Sanders,* we "beg[a]n by observing that our circuit recognizes causes of action under § 1983 for false arrest, illegal detention

4. We assume for purposes of this appeal that any false arrest claim would not be time-barred.

(false imprisonment) and malicious prosecution."[5] *Id.* at 1159. "These causes of action implicate the constitutional 'guarantees of the fourth and fourteenth amendments when the individual complains of an arrest, detention, and prosecution *without probable cause.*'" *Id.* (emphasis added) (quoting *Thomas v. Kippermann*, 846 F.2d 1009, 1011 (5th Cir.1988)).

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5. In *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir.2003) (en banc), we later concluded that "no such freestanding constitutional right to be free from malicious prosecution exists." *Id.* at 945. We held that "causing [criminal] charges to be filed without probable cause will not without more violate the Constitution." *Id.* at 953. However, we noted that "additional government acts that may attend the initiation of a criminal charge could give rise to claims of constitutional deprivation." *Id.*

> The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection-the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued. Such claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C. § 1983. Regardless, they are not claims for malicious prosecution and labeling them as such only invites confusion.

Id. at 953-54; *see also Deville v. Marcantel*, 567 F.3d 156, 169 (5th Cir.2009) (citing *Castellano* and holding that a malicious prosecution claim is not independently cognizable under § 1983).

In the context of evaluating the existence of probable cause and whether an officer is entitled qualified immunity, "we embark on a 'practical, common-sense [determination] whether given all of the circumstances' a reasonable officer could have believed 'there is a fair probability' [Plaintiff] committed the crime charged." *Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir.2000) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). In considering the totality of the circumstances, we disregard any false statements in the affidavit supporting the warrant which are made knowingly and intentionally, or with reckless disregard for the truth, and consider omissions that may have been critical to a determination of probable cause. *Hale v. Fish*, 899 F.2d 390, 400 & n. 3 (5th Cir.1990) (citing *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)).

Based upon the facts of this case, and construing them in Plaintiff's favor, Plaintiff is unable to establish a § 1983 claim for false arrest or illegal detention. The district court denied qualified immunity on the "reckless investigation" allegation, on the grounds that there was evidence that Defendants coerced Carreon into identifying Plaintiff, and then ignored Carreon's recantation of that identification. In *Mundy v. State of Georgia*, 586 F.2d 507 (5th Cir.1978) (per curiam), we held that impermissibly suggestive identifications which are used in conjunction with other evidence cannot form the basis of a § 1983 claim against an officer, where there was ample probable cause to swear out a warrant for the defendant's arrest. *See id.* at 508. Detective Terrones' complaint affidavit relied on police reports, a witness statement (Echemendia), as

well as a voluntary statement of the accused (Carreon). Unlike *Sanders*, it cannot be said that evidence that Carreon was pressured into identifying Plaintiff, if made known at the time of the issuance of the arrest warrant or later disclosed to the district attorney, would have established that there remained no probable cause for Plaintiff's arrest, detention, or prosecution, such that he would have been released. Leaving aside any misconduct which occurred with respect to Carreon's identification of Plaintiff and his later recantation, the record is clear that the magistrate at Plaintiff's examining trial was satisfied that Echemendia's identification testimony provided a separate and sufficient basis to support a finding of probable cause.[6] Echemendia provided the only identification testimony at the examining trial, at which Carreon did not testify.

The record further reflects that both the district attorney and defense counsel were aware of Carreon's recantation of Plaintiff's identification prior to Plaintiff's examining trial on May 24, 1994. Because this information was disclosed, this case is even more dissimilar from *Sanders*, and Plaintiff cannot support a false arrest or illegal detention claim based on this evidence. And unlike *Sanders*, in which the grand jury refused to indict, Plaintiff here was indicted.

Plaintiff maintains, and the district court found, however, that had Defendants "disclos[ed] [Robert]

6. The district court determined that the identification procedures used with Echemendia, the eyewitness, did not violate the Constitution, and granted qualified immunity as to this claim.

Hernandez's complete statement, then the value of Echemendia's eyewitness testimony would have been substantially reduced, if not obliterated." We must also consider omissions which may have been critical to a determination of probable cause.

First, we note that Robert Hernandez's statement was not obtained until after Detective Terrones had completed the complaint affidavit to support an arrest warrant. It was obtained before Plaintiff's examining trial occurred. Though Robert Hernandez's statement might have contradicted Echemendia's testimony, it did not eliminate it. Moreover, this purportedly exonerative evidence pales in comparison to that present in *Sanders*, where the defendant officer failed to disclose: (1) that the identifying victim was related to Sanders, yet was unable to name Sanders as the assailant until he saw him in a packed courtroom; (2) a negative identification by a witness who helped to compose the sketch of the robber; and (3) the existence of three credible alibi witnesses, one of whom was a former police officer. Under the circumstances of this case, a reasonable officer or magistrate could have believed that there was a fair probability Plaintiff committed the crime charged, even taking Robert Hernandez's statement into account.

Plaintiff's contention that qualified immunity should be denied on grounds that Defendants failed to thoroughly investigate Hamilton as a potential suspect is similarly unavailing. The record reflects that the investigation file, which included both Hamilton's and Stewart's statements, was turned over to the district attorney. It is undisputed

that the prosecution maintained an open file policy, such that this information was available to Plaintiff's criminal defense attorney. Plaintiff cannot argue that the case against him would have been dismissed any sooner on grounds that the prosecuting attorney was unaware of this potential suspect. Whatever flaws there may have been in Defendants' handling of Hamilton as a potential suspect, these were disclosed to Plaintiff prior to trial, and they did not alter Echemendia's identification. Under these facts, there was probable cause to both arrest and detain Plaintiff. We cannot say that no objectively reasonable officer would have concluded that probable cause did not exist.

In sum, "reckless investigation" was not a clearly established stand alone constitutional violation at the time of the events in question. Any reliance on *Sanders* for this proposition is misplaced. *Sanders* held that *evidence* of a reckless investigation could support cognizable constitutional claims, such as ones for false arrest or illegal detention, under § 1983. Even if we re-characterize Plaintiff's "reckless investigation" claim as one for illegal detention, or for some other cognizable constitutional violation, such as false arrest, because the exonerative evidence at issue would not have eliminated "the only thread of evidence tying [Plaintiff] to the crime," *Sanders*, 950 F.2d at 1164, and because the incriminating evidence which remained was sufficient to support the existence of probable cause, Plaintiff cannot demonstrate the violation of his constitutional right to be free from false arrest or illegal detention. Based on the foregoing, and because there was no clearly established constitutional right to

be free from a reckless investigation at the time of the events in question, Defendants are entitled to qualified immunity on this claim.

3. Defendants are Entitled to Qualified Immunity on Plaintiff's Fourteenth Amendment Claim for Suggestive Identification

The Second Amended Complaint alleges that Defendants violated Plaintiff's Fourteenth Amendment due process rights by "[m]anipulating identification evidence and conducting irreparably harmful and impermissibly suggestive identification procedures later presented as evidence against, and used to convict, the innocent Plaintiff." The district court denied qualified immunity on this claim, finding that material fact questions existed as to whether an unduly suggestive identification procedure was used to induce Carreon to identify Plaintiff. Defendants argue that the district court erred on grounds that there can be no Fourteenth Amendment due process violation where the alleged unduly suggestive identification was not used at trial, and where there existed an independent basis for a finding of probable cause in the complaint affidavit, as well as at the examining trial.

The United States Supreme Court has held that the determination as to whether a defendant's Fourteenth Amendment due process rights are violated by the admission of evidence at trial derived from unnecessarily suggestive identification procedures depends upon the totality of the circumstances surrounding those

procedures. *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). In *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the Supreme Court described the standard under the Due Process Clause as one of fairness, and identified the interest protected in *Stovall* as evidentiary. *Manson*, 432 U.S. at 113. The Court noted that "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest," *id.* at 113 n. 13, and held that "reliability is the linchpin" in determining the admissibility of such identification testimony, *id.* at 114. In assessing the reliability of an identification and evaluating whether there exists a high likelihood of misidentification, a number of factors should be considered.[7] *Id.* (citing *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). This analysis is in turn determinative of whether the evidence should be permitted to go to the jury. *See Biggers*, 409 U.S. at 201. Both *Stovall* and *Manson* reflect "the concern that the *jury* not hear eyewitness testimony unless that evidence has aspects of reliability." *Manson*, 432 U.S. at 112 (emphasis added).

Several circuits have interpreted *Stovall* and *Manson* to mean that, in the context of unduly suggestive lineups,

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7. These factors "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Manson*, 432 U.S. at 114.

no due process violation occurs unless a defendant's right to a fair trial is impaired. *See Pace v. City of Des Moines*, 201 F.3d 1050, 1055 (8th Cir.2000); *Hensley v. Carey*, 818 F.2d 646, 649 (7th Cir.1987); *Antonio v. Moore*, 174 Fed. App'x 131, 135-36 (4th Cir .2006). In *Hensley*, the Seventh Circuit concluded that *Stovall* and *Manson*, "establish procedural safeguards to insure that only reliable identification evidence is admitted at trial. *Stovall* and [*Manson*] do not establish a right to an impartial lineup as long as the evidence gained through that lineup is not used at trial." *Hensley*, 818 F.2d at 650. *Hensley* held that "[t]he rule against admission of evidence from unnecessarily suggestive lineups is a prophylactic rule designed to protect a core right, that is the right to a fair trial, and it is only the violation of the core right and not the prophylactic rule that should be actionable under § 1983." *Id.* at 649; *see also Pace*, 201 F.3d at 1055 ("The jurisprudential doctrine described in *Manson*..., against the admission of unduly suggestive lineups is only a procedural safeguard, and does not establish a constitutional right to be free of suggestive lineups."). We find this reasoning persuasive.

Plaintiff relies on *Geter v. Fortenberry*, 882 F.2d 167 (5th Cir.1989) (*Geter II*), which found that police employed unduly suggestive identification procedures where they "insist[ed] that [witnesses] pick an individual from photo lineups, prodd[ed] the witnesses to select another picture when they had chosen incorrectly, and bec[ame] hostile ... when a witness refused to cooperate." *Geter*, 882 F.2d at 170. Relying on *Geter II*, this Court recently concluded in *Good v. Curtis*, 601 F.3d 393 (5th Cir.2010), that "a police officer's knowing efforts to secure a false identification by

fabricating evidence or otherwise unlawfully influencing witnesses is not entitled to qualified immunity." *Good*, 601 F.3d at 398.

In *Good*, we also concluded that "[a] plaintiff need not undertake the impossible task of satisfying the [*Manson*] test where an officer's intentional conduct was designed to artificially produce precisely the sort of witness certainty that otherwise justifies the *admission* of suggestive lineups and the criminal defendant has been exonerated in the meantime." *Id.* at p. 401 (emphasis added). In *Good*, the officer deliberately framed the plaintiff for a crime he clearly had not committed, as DNA evidence conclusively established that the defendant was not guilty of the crime of which he had been convicted. *Id.* at 397, 398. Based upon this conclusive exonerative evidence, any positive identification of the defendant had to be incorrect. Thus, there was no need to determine whether the lineup suffered from a high "likelihood of misidentification," as required by *Manson*. *Id.* at 399.

However, it is clear from both *Geter II* and *Good*, that the improperly procured identifications at issue were introduced at the respective plaintiffs' criminal trials in both cases. Such is not the situation here. *Geter II* and *Good* are thus factually distinguishable from the present dispute in this important respect. We do not read either *Geter II* or *Good* as eroding the notion that, in order for there to be a due process violation in the context of an unduly suggestive identification procedure, the defendant's right to a fair trial must be impaired.

Turning to the case at bar, it is undisputed that Carreon invoked his Fifth Amendment right against self-incrimination, and refused to testify at both Plaintiff's examining trial and trial. His identification of Plaintiff was not the sole basis for the probable cause determination in seeking Plaintiff's arrest and detention. It was never introduced at either the examining trial or trial, and did not serve as the basis for his continued detention or eventual conviction at trial. Plaintiff's due process rights were therefore not violated, whether Carreon's pretrial identification of Plaintiff was either unduly suggestive or intentionally manipulated, as the identification was not "clearly critical" to the probable cause determination supporting Plaintiff's arrest and detention, nor was it ever admitted into evidence at trial.

In 1994, no violation of a clearly established constitutional right occurred where a defendant was afforded a fair trial not impaired by the admission of evidence derived from an unduly suggestive identification procedure. Defendants are entitled to qualified immunity on this claim.

4. **Defendants are Entitled to Qualified Immunity on Plaintiff's Fourteenth Amendment Claim for Withholding Exculpatory Evidence in Violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)**

Defendants appeal the district court's determination that Defendants "cannot avail themselves of qualified immunity because they failed to disclose *Brady*

exculpatory evidence relating to (1) the lack of association between Carreon and Plaintiff, (2) the collusive origin of Carreon's confession and identification, and (3) Carreon's presumed recantation."

Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the government must disclose material, exculpatory evidence to a criminal defendant. *United States v. Walters*, 351 F.3d 159, 169 (5th Cir.2003) (citing *Brady*, 373 U.S. at 87). "A valid *Brady* complaint contains three elements: (1) the prosecution must suppress or withhold evidence, (2) which is favorable, and (3) material to the defense." *United States v. Lanford*, 838 F.2d 1351, 1355 (5th Cir.1988) (quoting *United States v. Auten*, 632 F.2d 478, 481 (5th Cir.1980)). Impeachment as well as exculpatory evidence fall within *Brady's* purview. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

"Evidence is not 'suppressed' if the defendant 'knows or should know of the essential facts that would enable him to take advantage of it.'" *United States v. Runyan*, 290 F.3d 223, 246 (5th Cir.2002) (citing *United States v. Shoher*, 555 F.Supp. 346, 352 (S.D.N.Y.1983)); *see also United States v. Brown*, 628 F.2d 471, 473 (5th Cir.1980) ("[W]hen information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim."). With respect to "materiality," "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. "The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state." *Smith v. Black*, 904 F.2d 950, 967 (5th Cir.1990), *vacated*, 503 U.S. 930, 112 S.Ct. 1463, 117 L.Ed.2d 609 (1992), *abrogated on other grounds*, *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

Defendants argue that in 1994, *Brady* did not extend to police officers. They cite *Mowbray v. Cameron Cnty.*, 274 F.3d 269 (5th Cir.2001), in support of their position. In *Mowbray*, officers failed to provide exculpatory evidence to the defendant's counsel. Although this Court observed that "our research reveals, no case extending *Brady* to police officers ...," we also stated that "Mowbray does not allege, nor do the facts support a finding, that [the officers] elicited false evidence and deliberately concealed exculpatory evidence from all parties, including the prosecution." *Mowbray* then cited *Geter v. Fortenberry*, 849 F.2d 1550 (5th Cir.1988) (*Geter I*), which in turn cited *Brady*, and held "that a police officer cannot avail himself of a qualified immunity defense if he ... deliberately conceals exculpatory evidence, for such activity violates clearly established constitutional rights." *Geter*, 849 F.2d at 1559. Based on the foregoing, it was clearly established law in 1994 that *Brady* applied to police officers on facts such as those presented in this case. We now turn to each of Plaintiff's alleged *Brady* violations.

Appendix A

a. The Lack of Association Between Carreon and Plaintiff

The district court denied qualified immunity on this point on the basis that there was a question of fact as to whether Robert Hernandez had provided Detectives Terrones and Zimmerly with a statement that Plaintiff and Carreon did not know each other, which Zimmerly did not memorialize in his report. In determining that Hernandez's statement was material, the district court noted that "[s]ince there was no physical evidence linking Plaintiff to Cobb's murder, the entire criminal case against Plaintiff mainly consisted of Echemendia's eyewitness account." It stated that,

> if Defendants had disclosed Hernandez's statement that Plantiff and Carreon had never met, then Echemendia's eyewitness statement implicating both to Cobb's murder would have been undermined. Moreover, the demise of Echemendia as a credible prosecution witness would have done more than just nullify his testimony; it would also have served to discredit generally the police methods employed in assembling the case against Plaintiff, calling into question the veracity of testimony of other prosecution witnesses.

Hernandez v. City of El Paso, 662 F.Supp.2d 596, 619 (W.D.Tex.2009). Defendants argue on appeal that "Terrones and Zimmerly did not conceal evidence that Alejandro Hernandez and Augustine Carreon did not know each other because Juan Fernandez, [sic] Antonio

Garinian, Laura Cortazar and Alejandro Hernandez all testified to that fact at the murder trial of Alejandro Hernandez." Essentially, Defendants' argument is that Robert Hernandez's testimony was cumulative, such that its nondisclosure did not violate *Brady*. Unfortunately, the district court was deprived of the opportunity to address the question of whether Robert Hernandez's testimony was cumulative because Defendants never raised the issue below. Despite Defendants' failure to properly place this issue before the district court, because our review is *de novo* we will address it here.

The failure to disclose evidence which is cumulative does not present a *Brady* violation. *Allridge v. Scott*, 41 F.3d 213, 218 (5th Cir.1994). Here, Fernando Antonio Garinian testified at Plaintiff's trial that he and Carreon were friends, but that he had never seen Plaintiff before. Laura Cortazar, Plaintiff's girlfriend, testified that she did not know Carreon and had only heard of him in connection with this case. Plaintiff himself testified that he did not know Carreon.

By affidavit, Robert Hernandez testified in this case that he "told the detective that ... I knew both [Plaintiff] and [Carreon] but I knew for a fact that [Plaintiff] and [Carreon] did not know each other." This statement is largely cumulative of the testimony presented at the criminal trial. *See Andrews v. Collins*, 21 F.3d 612, 626 & n. 29 (5th Cir.1994) (testimony that is, in the main, cumulative is not material for purposes of *Brady*); *see also Edmond v. Collins*, 8 F.3d 290, 294 (5th Cir. 1993). If this statement could have lent any value to Plaintiff's defense,

it was at most incremental. Incremental impeachment value of suppressed evidence, however, does not raise a reasonable probability of a different result at trial. *See Drew v. Collins,* 964 F.2d 411, 419-20 (5th Cir.1992); *see also Miller v. Dretke,* 431 F.3d 241, 251 (5th Cir.2005). Because Plaintiff and two other witnesses did testify at the trial as to the lack of association between Carreon and Plaintiff, we cannot say that Robert Hernandez's testimony raises a reasonable probability of a different result at Plaintiff's trial.

We are not persuaded that *Lindsey v. King,* 769 F.2d 1034 (5th Cir.1985), which was cited below, changes the result. In *Lindsey,* the plaintiff appealed the denial of his petition for a writ of habeas corpus, alleging a *Brady* violation in connection with his underlying criminal trial. There, the prosecutor failed to disclose a statement made by an eyewitness shortly after the murder that he did not see the perpetrator's face, and would therefore be unable to make a positive identification. We concluded that the non-disclosed statement would have "cast serious doubt" on the testimony of that eyewitness, who made a positive identification of the plaintiff at his criminal trial. Though the testimony of a second eyewitness remained untouched by the statement, we found a *Brady* violation. We concluded that:

> our experience at the bar has been that positive identification by two unshaken witnesses possesses many times the power of such an identification by one only, and that the destruction by cross-examination of the credibility of one of

> two crucial witnesses-even if the other remains untouched-may have consequences for the case extending far beyond the discrediting of his own testimony.

Lindsey, 769 F.2d at 1042. Unlike Robert Hernandez's statement here, the non-disclosed statement at issue in *Lindsey* was not cumulative of other evidence. Finally, although not dispositive of this issue, we note that Plaintiff's criminal defense counsel knew or should have been aware of Robert Hernandez's identity prior to the trial based on the district attorney's open file policy. Robert Hernandez was not called to testify as a witness by either side. The record is silent on what attempts, if any, Plaintiff's defense counsel made to interview Robert Hernandez prior to trial. In any case, at a minimum, his identity as a potential witness was, or should have been, known to Plaintiff.

In sum, we conclude that no *Brady* violation occurred with regard to the alleged non-disclosure of Hernandez's cumulative statement.

b. The Collusive Origin of Carreon's Confession and Identification

The district court concluded that non-disclosure of the alleged collusive origin of Carreon's confession and identification presented fact questions as to whether there was a *Brady* violation. Plaintiff argues that Defendants have not briefed the issue, and have therefore waived it on appeal. Defendants have, however, argued that the district

court erroneously denied summary judgment on Plaintiff's *Brady* claim. Where the district court denies a motion for summary judgment on the basis of qualified immunity because "fact issues" remain, this Court may "either scour the record and determine what facts the plaintiff may be able to prove at trial and proceed to resolve the legal issues, or remand so that the trial court can clarify the order." *Thompson v. Upshur County, TX*, 245 F.3d 447, 456 (5th Cir.2001). In the interest of judicial economy, we elect to "scour the record" and address this claim.

Accepting Plaintiff's version of the facts as true, the record reflects that Carreon was strong-armed into identifying Plaintiff as his accomplice. Even if this information was suppressed, we do not see how its disclosure could have impacted the result of the criminal proceeding, since it is undisputed that Carreon did not testify at either Plaintiff's examining trial or his trial, and that Carreon's identification of Plaintiff was never introduced at either proceeding. In his supplemental brief filed after oral argument, Plaintiff argues that this evidence is material on grounds that it served as the basis for his conviction. He maintains that the only reason his photograph was included in the six-person photo array shown to Echemendia was because Carreon had been earlier coerced into identifying him as an accomplice. Thus, had he "known about the misconduct surrounding Carreon's identification, Echemendia would have had no credibility as a witness." We are not persuaded by this reasoning.

Plaintiff does not argue that Echemendia was

coerced into identifying Plaintiff, but instead argues that his picture would not have been included in the six-person photo array presented to Echemendia had the misconduct surrounding Carreon's identification not occurred. Accepting Plaintiff's version of the facts as true, any misconduct in selecting Plaintiff's photograph for inclusion in the photo array is insulated by Echemendia's independent identification of Plaintiff from the lineup, and does not raise a reasonable probability of a different outcome at trial.

Moreover, the district court concluded that the six-person photographic lineup shown to Echemendia was not impermissibly suggestive, and granted qualified immunity on this claim. *Hernandez,* 662 F.Supp.2d at 611-12. Thus, the constitutionality of the identification procedures employed in Echemendia's identification of Plaintiff are not before us on this appeal, and this Court lacks jurisdiction to consider them.

In sum, no *Brady* violation occurred with respect to this evidence.

c. Carreon's Recantation

[9] The district court found that the alleged non-disclosure of Carreon's recantation of his identification of Plaintiff as his accomplice to Detectives Terrones and Ruiz would violate *Brady.* The record reflects, however, that Plaintiff was present and overheard Carreon's recantation at the time it was made. It is also clear that Plaintiff's criminal defense counsel knew of the presumed

recantation before his trial in October 1994, and at least as early as May 24, 1994, the date of Plaintiff's examining trial.

"*Brady* claims involve 'the discovery, *after* trial of information which had been known to the prosecution but unknown to the defense.'" *Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994) (emphasis added); *see also United States v. Fogg*, 652 F.2d 551, 558 (5th Cir.1981). In *United States v. Brown*, 628 F.2d 471 (5th Cir.1980), this Court stated:

> regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of diligence, the defendant has no *Brady* claim....In no way can information known and available to the defendant be said to have been suppressed by the Government.

Id. at 473. Based on the facts of this case, and the law as it existed in 1994, there was no *Brady* violation with respect to the alleged suppression of this evidence, as Plaintiff and his counsel were clearly aware of Carreon's recantation prior to trial. Moreover, because Carreon did not testify at Plaintiff's trial, and because Carreon's identification of Plaintiff was never introduced, we do not see how disclosure of Carreon's recantation of his identification of Plaintiff could have impacted the result of the criminal proceeding in any significant way.

Resolving all factual disputes in Plaintiff's favor, he has not shown the violation of a clearly established constitutional right on his *Brady* claim. Defendants are therefore entitled to qualified immunity.

IV. CONCLUSION

We decline to exercise pendent jurisdiction over the district court's denial of summary judgment on the statute of limitations issue. Plaintiff has not established the violation of any clearly established constitutional rights on his individual capacity § 1983 claims as the law existed in 1994. Defendants Jesus Terrones, Guillermo Martinez, Arturo Ruiz, Jr., Antonio Tabullo, Joe Zimmerly, and Pedro Ocegueda, are therefore entitled to qualified immunity on Plaintiff's remaining individual capacity § 1983 claims against them. Accordingly, we REVERSE the district court's denial of qualified immunity, and REMAND for entry of summary judgment in Defendants' favor on Plaintiff's 42 U.S.C. § 1983 claims against Defendants in their individual capacities. We DISMISS the appeal as to the statute of limitations defense for lack of jurisdiction.

REVERSED in part, DISMISSED in part, and REMANDED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, W.D. TEXAS, EL PASO DIVISION DATED JULY 9, 2009

United States District Court,
W.D. Texas,
El Paso Division.

No. EP-08-CV-222-PRM
July 9, 2009

Alejandro HERNANDEZ,

Plaintiff/Counter-Defendant,

v.

The CITY OF EL PASO; Jesus Terrones, in his individual and official capacity; Guillermo Martinez, in his individual and official capacity; Arturo Ruiz, Jr., in his individual and official capacity; Sal Dominguez, in his individual and official capacity; Antonio Tabullo, in his individual and official capacity; Joe Zimmerly, in his individual and official capacity; and Pedro Ocegueda, in his individual and official capacity,

Defendants/Counter-Plaintiffs.

Appendix B

MEMORANDUM OPINION GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING AS MOOT PLAINTIFF'S MOTION TO STRIKE CERTAIN OPINIONS OF THE AFFIDAVIT OF DEFENDANTS' EXPERT WITNESS ROBERT TAYLOR; AND DENYING AS MOOT DEFENDANTS' MOTION TO STRIKE AFFIDAVIT AND TO EXCLUDE PLAINTIFF'S EXPERT WITNESS TROY WILKE

PHILIP R. MARTINEZ, District Judge.

On this day, the Court considered Defendants Jesus Terrones, Guillermo Martinez, Arturo Ruiz, Jr., Sal Dominguez, Antonio Tabullo, Joe Zimmerly, and Pedro Ocegueda's (collectively, "Defendants") "Motion for Summary Judgment," filed on September 4, 2008; Defendants' "Appendix of Material in Support of Defendants' Motion for Summary Judgment," filed on September 4, 2008; Plaintiff Alejandro Hernandez's ("Plaintiff") "Response in Opposition to Defendants' Motion for Summary Judgment," filed on November 25, 2008;[1] Plaintiff's "Brief in Support of Plaintiff's Response in Opposition to Defendants Jesus Terrones, Guillermo Martinez, Arturo Ruiz, Jr., Antonio Tabullo, Joe Zimmerly, and Pedro Ocegueda's Motion for Summary Judgment," filed on November 25, 2008; Plaintiff's

1. On October 4, 2008, the Court granted Plaintiff leave to file his response to Defendants' motion for summary judgment on November 25, 2008, so he could conduct further discovery in this matter. Docket No. 41.

Appendix B

"Appendix to Plaintiff's Response to Defendants' Motion for Summary Judgment," filed on November 25, 2008; Defendants' "Reply to Plaintiff's [sic] Response in Opposition to Defendants [sic] Motion for Summary Judgment," filed on December 8, 2008; Plaintiff's "Motion to Strike Certain Opinions of the Affidavit of Defendant's Expert Witness Robert Taylor," filed on December 19, 2008; Defendants' "Response to Plaintiffs [sic] Motion to Strike Certain Opinions of Defendants [sic] Expert Witness Robert Taylor," filed on December 29, 2008; Defendants' "Motion to Strike Affidavit and to Exclude Plaintiffs [sic] Expert Witness Troy Wilke," filed on December 5, 2008; Plaintiff's "Response in Opposition to Defendant Officers' Motion to Strike Affidavit and Exclude Plaintiff's Witness Troy Wilkie [sic]," filed on December 19, 2008; Defendants' "Reply to Plaintiffs [sic] Response in Opposition to Defendants [sic] Motion to Strike Affidavit and Exclude Plaintiffs [sic] Expert Witness Troy Wilke," filed on December 29, 2008, in the above-captioned cause. After due consideration, the Court is of the opinion that Defendants' motion for summary judgment should be granted in part and denied in part.

I. INTRODUCTION

On October 19, 1994, Alejandro Hernandez ("Plaintiff") was wrongfully convicted in the 168th District Court of El Paso, Texas for murdering Robert Cobb ("Cobb") and sentenced to ninety-nine years in prison.[2] Pl.'s Second

2. The Texas Eighth District Court of Appeals affirmed Plaintiff's conviction. *Hernandez v. State*, No. 08-94-355-CR, slip op. (Tex.App.-El Paso, Aug. 15, 1996, no pet.).

Am. Compl. ¶¶ 17, 58-60; App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 47. On June 21, 2006, after serving nearly thirteen years in prison, Pl.'s Second Am. Compl. ¶¶ 2, 16, the Texas Court of Criminal Appeals overturned Plaintiff's conviction and remanded the cause to the 168th District Court, *Ex Parte Hernandez,* No. AP-75,445, 2006 WL 1687713 (Tex.Crim.App. June 21, 2006) (per curiam). On September 18, 2006, the 168th District Court, with the cooperation of the El Paso District Attorney's Office, dismissed the charges against Plaintiff. Pl.'s Second Am. Compl. ¶ 59; App. in Support of Defs.' Mot. for Summ. J. Q-S. Following the dismissal of his charges, on June 20, 2008, Plaintiff filed suit against the City of El Paso and several police officers under 42 U.S.C. §§ 1983 and 1985(3), as well as under the Fourteenth Amendment to the U.S. Constitution, for violations of his civil rights resulting from his wrongful arrest, prosecution,[3] and conviction. Pl.'s Second Am. Compl. ¶¶ 63-78. Aside from these federal claims,[4] Defs.' Mot. for Summ. J. ¶ 2, Plaintiff additionally brings state law claims for intentional infliction of emotional distress, malicious prosecution, and civil conspiracy.[5] Pl.'s Second Am. Compl. ¶¶ 79-85.

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3. On October 27, 2008, the Court dismissed Plaintiff's malicious prosecution claim and also dismissed Defendant Sal Dominguez in his individual and representative capacity from this action without prejudice. Docket No. 56-57.

4. Not addressed here, however, is Plaintiff's *Monell* claim against the City of El Paso for the purported "unlawful municipal policies and practices" employed by Defendants in their capacity as police officers in this action. Pl.'s Second Am. Compl. ¶¶ 2, 69-72.

5. Defendants filed a counter-claim against Plaintiff claiming that, if they prevail, they are entitled to attorneys' fees pursuant to 42 U.S.C. § 1988. Defs.' Orig. Ans. ¶ 31.

Appendix B

II. FACTUAL AND PROCEDURAL BACKGROUND

On May 11, 1994, the El Paso Police Department discovered the lifeless body of Robert Cobb, a homeless Vietnam veteran, lying beside his broken-down car near the north desert area of El Paso, Texas. Pl.'s Second Am. Compl. ¶¶ 19-21. At approximately 2:30 a.m. on the night of Cobb's death, Dee "Baby" Stewart ("Stewart") was in his apartment-located near the scene of Cobb's murder-when he received an unexpected visit from his neighbor, Brandon Hamilton ("Hamilton"). *Id.* ¶ 24; App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 4, 14. During Hamilton's visit, Stewart noticed that "Hamilton was breathing hard, his shoes were covered in mud, and he carried a small pocket knife." Pl.'s Resp. to Defs.' Mot. for Summ. J. 1; *accord* Pl.'s Second Am. Comp. ¶ 24. Aside from these observations, Stewart additionally noticed that Hamilton's hands and pocket knife were covered in blood. Pl.'s Resp. to Defs.' Mot. for Summ. J. 1; App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 4, 14. Upon his arrival, Hamilton allegedly told Stewart that he "wasn't going to believe it, but [he] just killed somebody!" Pl.'s Second Am. Compl. ¶ 24; App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 4, 14. Hamilton then proceeded to narrate the intricate details of Cobb's murder as he washed the blood off his hands and knife in Stewart's kitchen sink. Pl.'s Second Am. Compl. ¶¶ 25, 27; Pl.'s Resp. to Defs.' Mot. for Summ. J. 2.

Allegedly, Hamilton told Stewart that, on the evening of May 10, 1994, he approached an old Pontiac Trans Am where Cobb was sleeping. Pl.'s Second Am. Compl. ¶ 25; App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 14.

While Cobb slept inside the vehicle, Hamilton attempted to discretely enter the vehicle through the passenger's side, eventually awakening Cobb. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 14. After Cobb awoke, both men spoke briefly, and Hamilton entered the vehicle through the passenger's side. Pl.'s Second Am. Compl. ¶¶ 25-26. Following a short conversation, Hamilton asked Cobb to step outside the vehicle so they could "look at the stars." App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 14. While they were standing next to the vehicle, Hamilton stabbed Cobb on the shoulder close to the neck with a two-inch pocket knife. *Id.* Despite Cobb's supplications, Hamilton stabbed him twenty-nine times in his upper chest, neck, and back. *Id.* at 30; Pl.'s Second Am. Compl. ¶ 21. Realizing that Cobb was still breathing, Hamilton obtained a steel anti-theft device from the trunk of Cobb's vehicle. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 34. Thereafter, Hamilton rolled Cobb's body over and crushed his face with the steel device, bludgeoning him to death. Pl.'s Second Am. Compl. ¶¶ 25-26. After killing Cobb, Hamilton stole a few electronic items from Cobb's vehicle and eventually fled the scene. *Id.* ¶ 26. Uncertain that Hamilton was telling the truth, Stewart did not contact the police that night. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 4, 14, 46.

The next morning, on May 11, the El Paso Police Department discovered Cobb's murdered body. Pl.'s Second Am. Compl. ¶¶ 19-21. Shortly after the police arrived at the crime scene, El Paso Police Sergeant Pedro Ocegueda ("Sergeant Ocegueda") named Detective Jesus Terrones ("Detective Terrones") as the case

agent in Cobb's homicide.[6] Terrones Dep. 131:9-15; Pl.'s Second Am. Compl. ¶ 28. Thereafter, in an attempt to gather evidence, Detective Terrones and Detective Sal Dominguez ("Detective Dominguez") visited Garcia's Automotive, a business located near the crime scene. Terrones Dep. 125:12-15. After briefly speaking to Garcia, the two detectives went to Ed's Classic Upholstery Shop located in the same shopping center. Pl.'s Second Am. Compl. ¶ 31. There, Detective Terrones interviewed Stacy Leon, the owner's wife. Terrones Dep. 126:9-15. During the interview, Leon mentioned that Augustin Fabio Carreon ("Carreon"), Garcia's stepson from the neighboring business, was involved in gangs and was responsible for the graffiti on the back walls of the shopping center. Terrones Dep. 125:12-20; App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 18. Based on this information, Detective Terrones examined the graffiti on the back walls. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 18.

Following his inspection of the graffiti, Detective Terrones was able to discern the alias "Gopy," which he believed to be gang-related. Pl.'s Second Am. Compl. ¶¶ 30-32. Detective Terrones thereafter "contacted the El Paso gang unit to see if 'Gopy' was a moniker for a known gang

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6. While at the crime scene, the El Paso Police Department lifted fifteen latent fingerprints from Cobb's vehicle and other items, but "only 5 [fingerprints] were determined complete enough to have evidentiary value." Pl.'s Second Am. Compl. ¶ 29. Nevertheless, out of the five viable fingerprints, the police determined that three belonged to Robert Cobb, leaving the remaining two fingerprints unidentified at that early stage in the investigation. *Id.*

member." *Id.* ¶ 30. By the time Detective Terrones left the shopping center, he "received information that 'Gory,' not 'Gopy,' was an alias for Robert Reyes Hernandez" ("Hernandez"). *Id.* ¶ 32. After searching through the El Paso Police Department's records management system, Terrones Dep. 183:16-184:2, Detective Terrones realized that police had previously arrested Hernandez and Plaintiff "for [attempting to] shoplift[ ] a pair of jeans at a Mervyn's Department Store" some time before Cobb's murder, Pl.'s Second Am. Compl. ¶ 32. In light of this information, Detective Terrones began drafting an affidavit seeking the arrest of Plaintiff for Cobb's murder. Pl.'s Second Am. Compl. ¶ 32.

The following day, on May 13, Detectives Terrones and Dominguez returned to Ed's Classic Upholstery Shop. *Id.* ¶ 33. Once they arrived, Rolando Echemendia ("Echemendia"), one of Leon's employees, approached the detectives and told them that he had witnessed Cobb's murder. Terrones Dep. 127:5-128:10. During their conversation, Echemendia stated that Carreon was involved in the murder and that Plaintiff was his accomplice. Pl.'s Second Am. Compl. ¶ ¶ 34-38. In light of this information, Detective Guillermo Martinez ("Detective Martinez") and Detective Arturo Ruiz, Jr. ("Detective Ruiz") took Echemendia to police headquarters where Detective Martinez interviewed him. Martinez Dep. 115:25-116:4. At police headquarters, Echemendia gave a statement, which provided in relevant part:

> What I saw happened at about 1:30 a.m. early Wednesday morning, 05-11-1994. On that early

morning[,] I was outside of the shop at 9411 Dyer ... At about that time[,] I saw the three males standing ... on the corner of Dyer and Diana. They were all standing next to a Trans Am type of car ... I noticed that all of the males were having a discussion of some type ... One of the males was a white male that had a beard ... The second male was a person by the name of [Carreon], ... he is the son of the owner of Garcia's Auto Shop, which is located in the same shopping strip where I work at ... The other male was a Latin male, 23 to 24 years of age.

* * *

The three males were arguing about money ... I could also see that the white male was carrying some type of black bag under one of his arm pits ... [T]he contents of the black bag were what I believed to be round balloons containing [h]eroin ... When the white male showed the contents of the black bag to [Carreon] and the Latin male, [Carreon] told the white male to give him the stuff and that he would give the money to the white male later ... The white male then told the other two males to get into the car ... The car then backed up towards Dyer ... just West of the shopping strip center where I work at ... A short time later I heard what appeared to be moans and groans coming from the area where they had driven to ... While I was there waiting[,] I heard [Carreon and the Latin

> male] running ... I then heard [Carreon] tell the Latin male, "*te lo hechaste, Buey,*" which I understood to say, you killed him. The Latin male then told [Carreon], "*dame una camisa,*" which I understood to mean, give me a shirt. I also saw that the Latin male had blood on his shirt and on his right hand ... I saw [Carreon] and the Latin male running to the front of Garcia's Auto Shop.[7]

App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 26 (emphasis in original).

After giving his statement to the police, Echemendia identified Carreon from a single photograph provided by Detective Martinez. Martinez Dep. 160:17-161:4; Pl.'s Second Am. Compl. ¶ 40. Additionally, Echemendia identified Plaintiff as Carreon's accomplice from a photographic line-up prepared by Detective Terrones. Pl.'s Second Am. Compl. ¶ 40; Terrones Dep. 213:8-10; Martinez Dep. 166:14-18. After hearing Echemendia's recitation of events, Detective Terrones prepared affidavits and arrest warrants for Carreon and Plaintiff. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 12, 16. As such, Detective Terrones dispatched Detectives Joe Zimmerly ("Detective Zimmerly") and Antonio Tabullo ("Detective Tabullo") to arrest Carreon and Plaintiff. Pl.'s Second Am. Compl. ¶ 39.

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7. Aside from the three males, Echemendia stated that he also observed a black female at the time of Cobb's murder, App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 26; however, the police were never able to locate her, Pl.'s Second Am. Compl. ¶ 53.

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Following a brief search, Detectives Tabullo and Zimmerly located Carreon at a bus stop near Garcia's Automotive and subsequently took him to police headquarters. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 12. At police headquarters, Detective Tabullo interrogated Carreon, who initially maintained his innocence. Pl.'s Second Am. Compl. ¶¶ 41-42. Despite insisting on his innocence, Carreon eventually signed a statement implicating himself and another man in Cobb's death after Detective Tabullo confronted him with Echemendia's accusatory statement. Terrones Dep. 178:16-17; App. in Support of Defs.' Mot. for Summ. J.H. After his alleged confession, Carreon claimed that he simply knew his purported accomplice by the nickname "Guero." Pl.'s Second Am. Compl. ¶ 42. At that time, Detective Ruiz, under the direction of Sergeant Ocegueda, returned to Carreon and showed him a single photograph of Plaintiff. *Id.* ¶ 44; App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 23. After Detective Tabullo allegedly told Carreon that "he could go free" if he named his accomplice, Pl.'s Second Am. Compl. ¶ 41, Carreon signed an additional statement identifying Plaintiff as his accomplice, App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 6, 17. That night, based on Carreon's identification, Detectives Zimmerly and Martinez arrested Plaintiff at his residence.[8] Pl.'s Second Am. Compl. ¶ 43.

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8. Despite identifying Plaintiff as his alleged accomplice, once Carreon saw Plaintiff for the first time, he adamantly asserted to Detectives Terrones and Ruiz that he did not know him; *see* Terrones Dep. 180:25-181:6, but Detective Ruiz allegedly "told him that it was too late to change his story now," Pl.'s Second Am. Compl. ¶ 45.

However, the next day, Sergeant Ocegueda advised Detectives Dominguez and Martinez that he had received a call from Stewart. *Id.* ¶ 46. Sergeant Ocegueda told them that Stewart had notified him that Hamilton, his neighbor, might be involved in Cobb's murder. App. in Support of Defs.' Mot. for Summ. J. H. Specifically, Stewart told the officers that, on the night of Cobb's death, Hamilton confessed to him that he had killed Cobb and stolen some electronic items from his vehicle.[9] Pl.'s Resp. to Defs.' Mot. for Summ. J. 2. After taking Stewart's statement, App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 14, Detectives Martinez and Dominguez brought Hamilton to police headquarters, Martinez Dep. 174:5-8.

At police headquarters, the detectives positively matched Hamilton's fingerprints to a previously unidentified latent fingerprint found at the scene of Cobb's murder. Pl.'s Second Am. Compl. ¶ 47. Based on this evidence, Sergeant Ocegueda directed Detective Dominguez to interview Hamilton. Terrones Dep. 196:5-12; *see* Martinez Dep. 119:14-15. During the interview, Hamilton firmly insisted on his innocence, only admitting that he had been with Cobb a few days earlier and had touched his vehicle. *Id.* at 198:11-22; Pl.'s Second Am. Compl. ¶ 47. "According to Hamilton, he had stopped to talk to Robert Cobb the week [before his murder] to get a

9. Uncertain that Hamilton was telling the truth, Stewart, as noted before, did not initially contact the police regarding Hamilton's confession of murdering Cobb. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 4, 14, 46. However, after seeing a local news report a few days later about Cobb's murder, Stewart reported this information to the police. *Id.*

look at the electronic equipment Cobb kept in his car." Pl.'s Second Am. Compl. ¶ 47. At the conclusion of the interview, the detectives, under the direction of Sergeant Ocegueda, released Hamilton without taking his statement.[10] *See id.*; Terrones Dep. 199:7-9, 203:12-25. Thus, without performing any additional investigation on the case, the El Paso Police Department concluded their investigation into Cobb's murder. Pl.'s Resp. to Defs.' Mot. for Summ. J. 2; Pl.'s Second Am. Compl. ¶ 53; Terrones Dep. 196:20-22.

On June 14, 1994, shortly after the police ceased their investigation, a grand jury in El Paso, Texas indicted Plaintiff for first-degree murder. App. in Support of Defs.' Mot. for Summ. J.H. Consequently, Plaintiff was tried for Cobb's murder in the 168th District Court in El Paso County,[11] Pl.'s Second Am. Compl. ¶¶ 58-60, and was eventually convicted and sentenced to ninety-nine years in prison, App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 47. However, on June 21, 2006, after serving nearly thirteen years in prison, Pl.'s Second Am. Compl. ¶¶ 2, 16, the Texas Court of Criminal Appeals overturned Plaintiff's conviction, *Ex Parte Hernandez*, No. AP-75,445, 2006

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10. The El Paso Police Department eventually obtained a statement from Hamilton regarding his acquaintance with Cobb only after the state prosecutors reviewing Plaintiff's criminal case requested it. Pl.'s Second Am. Compl. ¶ 51.

11. The State tried Carreon and Plaintiff separately for Cobb's murder. Defs.' Reply to Pl.'s Resp. to Defs.' Mot. for Summ. J. ¶ 13. Although Carreon was indicted for murder, the state jury found him guilty of the lesser included offense of aggravated assault, resulting in a sentence of two years' probation. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 47.

WL 1687713 (Tex.Crim.App. June 21, 2006) (per curiam), resulting in the dismissal of his criminal charges, App. in Support of Defs.' Mot. for Summ. J. Q-S. Following the dismissal of his charges, on June 20, 2008, Plaintiff brought a § 1983 claim against the City of El Paso and several police officers for violations of his civil rights resulting from his wrongful arrest, prosecution, and conviction. Pl.'s Second Am. Compl. ¶¶ 63-85; Defs.' Mot. for Summ. J. ¶ 2.

On September 4, 2008, Defendants moved for summary judgment. Docket No. 33. Therein, Defendants specifically argue (1) that Plaintiff's claims are judicially estopped; (2) that Plaintiff's Fourteenth Amendment due process claim is barred by the statute of limitations because it is actually a Fourth Amendment false arrest claim; (3) that Plaintiff's Fourteenth Amendment claims for (i) failure to investigate, (ii) failure to develop exculpatory evidence, (iii) suggestive identification procedures; and (iv) *Brady* violations fail as a matter of law; (4) that Plaintiff's conspiracy claim under 42 U.S.C. § 1985(3) also fails because he neglected to allege racial or other class-based discrimination; and (5) that Plaintiff cannot avail himself under the laws of the State of Texas for (i) intentional infliction of emotional distress, (ii) malicious prosecution, and (iii) civil conspiracy. Defs.' Mot. for Summ J. ¶ 6. Accordingly, for the reasons discussed below, the Court will grant in part and deny in part the instant motion.

Appendix B

III. LEGAL STANDARD

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, a court should find summary judgment appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c) . A genuine issue of material fact exists only if there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In a motion for summary judgment, "[t]he moving party bears the initial burden of showing that there is no genuine issue for trial; it may do so by 'point[ing] out the absence of evidence supporting the nonmoving party's case.' " *Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 712 (5th Cir.1994) (quoting *Latimer v. Smithkline & French Labs.*, 919 F.2d 301, 303 (5th Cir.1990)). If the moving party has satisfied its initial burden, the non-movant must then come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citing FED. R. CIV. P. 56(e)). When a moving party requests that a court grant its motion for summary judgment, a court "will review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto. Ins. Co.*, 784

F.2d 577, 578 (5th Cir.1986). While a court will resolve factual controversies or disputes in the nonmovant's favor, it must do so "only when there is an *actual* controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc) (emphasis added). A court should not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *Id.* (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)).

IV. ANALYSIS

A. Statute of Limitations

Defendants argue that Plaintiffs Fourteenth Amendment due process claim is barred by the statute of limitations because the claim is actually a false arrest claim under the Fourth Amendment. Defs.' Mot. for Summ. J. ¶ 12. If Defendants are correct, then the statute of limitations would "begin[ ] to run at the time the claimant becomes detained pursuant to legal process.' " *Id.* (quoting *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091, 1100, 166 L.Ed.2d 973 (2007)). In this case, because Plaintiff "was detained pursuant to legal process on May 14, 1994," Defendants maintain that Plaintiff's claims are barred by the two-year statute of limitations. *See id.* Plaintiff, on the other hand, argues that "where the [p]laintiff's cause[ ] of action under the Fourteenth Amendment ... impugn[s] his conviction, the applicable [statute of] limitations [is] tolled until that conviction is overturned." Pl.'s Resp. to Defs.' Mot. for Summ. J. 32. The Court agrees.

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There is no federal statute of limitations for § 1983 claims. *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir.1989). For this reason, when considering § 1983 claims, federal courts borrow the forum state's "residual" or "general" personal injury limitations period and applicable tolling provisions.[12] *See Owens v. Okure*, 488 U.S. 235, 249-50, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). Accordingly, in Texas, the applicable statute of limitations period is two years. TEX. CIV. PRAC. & REM.CODE ANN. § 16.003(a) (Vernon 2007).

Although Texas law governs the limitations period and the tolling exceptions, federal law governs when a plaintiff's cause of action accrues. *Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir.1983); *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir.1980). Under federal law, a cause of action accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *See, e.g., Gartrell v. Gaylor*, 981 F.2d 254, 257 (5th Cir.1993) (per curiam) (citing *Listi*, 611 F.2d at 1131). However, in § 1983 claims that effectively attack the constitutionality of a conviction or imprisonment, as here, the cause of action does not begin to accrue "until the conviction or

12. The Supreme Court has held that where a state, like Texas, provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should adopt the state's "residual" or "general" personal injury limitations period rather than the prescriptive period for enumerated intentional torts. *Owens*, 488 U.S. at 249-50, 109 S.Ct. 573; *compare* TEX. CIV. PRAC. & REM.CODE ANN. § 16.002(a) (one-year limitations period for malicious prosecution, libel, slander, and breach of promise to marriage) *with* TEX. CIV. PRAC. & REM.CODE ANN. § 16.003(a) (two-year limitations period for personal injury).

sentence [has been] reversed, expunged, invalidated, or *impugned by the grant of a writ of habeas corpus.*" *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 489, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (emphasis added). The Supreme Court imposed this requirement on § 1983 plaintiffs to avoid collateral attacks by plaintiffs on convictions that are still outstanding. *Id.* at 486, 114 S.Ct. 2364. Thus, in this case, Plaintiff's cause of action began to accrue on June 21, 2006, the date when the Texas Court of Criminal Appeals granted his writ of habeas corpus and overturned his conviction. *See Ex Parte Hernandez*, No. AP-75,445, 2006 WL 1687713 (Tex.Crim.App. June 21, 2006) (per curiam). Because Plaintiff commenced this action on June 20, 2008, a day shy of the two-year statute of limitations, the Court concludes that his Fourteenth Amendment claims are not barred.

B. Judicial Estoppel

Defendants next argue that Plaintiff is "judicially estopped from asserting the position of alleged police misconduct in this lawsuit because [it] is contrary to his position in [the habeas] proceeding involving the same evidence and parties." Defs.' Mot. for Summ. J. ¶ 6. In making this claim, Defendants note that "Plaintiff never raised police misconduct as an issue or point of error at any stage of the criminal proceedings that resulted in his 1994 prosecution for murder." *Id.* ¶ 9. Instead, as Defendants point out, "Plaintiff's [w]rit of [h]abeas [c]orpus proceeding was based on ineffective assistance of counsel and factual innocence based on new evidence." *Id.* However, despite Defendants' allegations, the Court finds that application of judicial estoppel is inappropriate in this case.

"Judicial estoppel is an equitable doctrine that 'prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.' " *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir.2008) (quoting *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir.2003)). The salient purpose of the doctrine is to "protect[ ] the essential integrity of the judicial process" by reducing the "risk of inconsistent court determinations," *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (internal quotations omitted), and "[to] prevent [ ] parties from playing fast and loose with the courts to suit the exigencies of self interest,'" *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 334 (5th Cir.2004) (quoting *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 205 (5th Cir.1999)). When considering whether to invoke this equitable doctrine in a particular case, courts consider (1) whether the party's position was "clearly inconsistent" with its previous one, (2) whether the previous court accepted the party's earlier position, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *See, e.g., New Hampshire*, 532 U.S. at 750-51, 121 S.Ct. 1808. However, "[i]n enumerating these factors," the Supreme Court "[did] not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *Id.* at 751, 121 S.Ct. 1808. "Additional considerations may inform the doctrine's application in specific factual contexts." *Id.*

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In this case, the Court declines Defendants' invitation to invoke the doctrine of judicial estoppel. The Court primarily is not convinced that Plaintiff's statements in this case are "clearly" inconsistent with his earlier statements in his habeas proceeding. During his habeas proceeding, Plaintiff claimed, as here, that several police officers engaged in unlawful police practices. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 47. Specifically, Plaintiff contended during his habeas proceeding that "Carreon's identification of [him] was *coaxed* by the improper promise of leniency by police officers." *Id.* (emphasis added). Moreover, Plaintiff argued that Carreon had "signed an affidavit [following his trial, claiming that] his alleged confession [and identification of Plaintiff] to police officers was not given voluntarily." *Id.* In support of these claims, during his habeas proceeding, Plaintiff referred to the following colloquy from Carreon's criminal trial:

> A: [Carreon:] He said, "Just say you did it and I'll let you go. I promise." I had it in my mind. I don't know this guy.
>
> Q: [State:] You don't know what guy?
>
> A: A Mr.-the co-defendant.
>
> Q: You don't know [Plaintiff]?
>
> A: No.
>
> Q: Okay. You just figured, "What the heck. I'll send him up the river?"

A: Basically, yeah. Well, I don't know this guy that-[Detective] Tabullo is saying, "Say he did it. Sign here. I promise I'll let you go." I said to myself, "I don't know this guy. I don't know what he's talking about." I had it in my mind, so-

Q: So did you just make up a guy?

A: No. He showed me a picture.

Q: Detective Tabullo showed you a picture?

A: Yeah.

Q: Okay. Now, you had the benefit of listening to Detective Tabullo didn't you?

A: Yes.

Q: So are you telling the Ladies and Gentlemen [sic] that Detective Tabullo, an 18-year veteran of the El Paso Police Department, lied?

A: Yeah.

Id.

Even though the Texas Court of Criminal Appeals ultimately granted Plaintiff's writ of habeas corpus based on ineffective assistance of counsel, it is evident, based on the record above, that Plaintiff raised the issue of police misconduct in his habeas proceeding. Judicial estoppel, as stated before, "generally prevents a party

from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire*, 532 U.S. at 749, 121 S.Ct. 1808 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000)). No such contradiction exists here. Even assuming that Plaintiff's claims are inconsistent, it would be wrong, in the Court's view, to invoke judicial estoppel in this case to essentially derail a potentially meritorious claim, especially when the alleged inconsistency is insignificant at best and there is no evidence of an intent to manipulate or mislead the Court. Because the Court perceives little, if any, threat to the integrity of the judicial process, it resists the application of judicial estoppel in this matter.

C. Qualified Immunity

Defendants additionally argue that Plaintiff's § 1983 claims for (i) failure to investigate, (ii) failure to develop exculpatory evidence, (iii) suggestive identification procedures; and (iv) *Brady* violations fail as a matter of law because Defendants are entitled to qualified immunity. Defs.' Mot. for Summ. J. ¶¶ 13-33. In particular, Defendants maintain that they are immune from these claims because "they acted reasonably, properly, and in the good faith belief that they were not violating any constitutional right of Plaintiff, were not violating any [statute] of the State of Texas, or clearly established law." Defs.' Orig. Ans. ¶ 62.

Section 1983 provides a cause of action for individuals who have been "deprived of any rights, privileges, or

immunities secured by the Constitution and laws" of the United States by a person or entity acting under color of state law.[13] 42 § 1983. However, qualified immunity shields state actors performing discretionary functions from liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *McClendon v. City of Columbia*, 305 F.3d 314, 322 (5th Cir.2002) (en banc) (quoting *Harlow Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)); *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir.2003).

To determine whether a state actor is entitled to qualified immunity, the Court must employ a two-prong test. *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 621 (5th Cir.2006). First, the Court must evaluate whether "in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) . If so, the Court then "consider[s] whether the [officer]'s actions were ob-

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13. Title 42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

jectively unreasonable in light of clearly established law at the time of the conduct in question." *Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007). "The touchstone of this inquiry is whether a reasonable person would have believed that his conduct conformed to the constitutional standard in light of the information available to him and the clearly established law." *Goodson v. Corpus Christi*, 202 F.3d 730, 736 (5th Cir.2000). This means that even law enforcement officials who "reasonably but mistakenly [commit a constitutional violation]" are entitled to immunity. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991); *Glenn v. City of Tyler*, 242 F.3d 307, 312 (5th Cir.2001).

When public officials, as here, plead the affirmative defense of qualified immunity, it is the plaintiff's burden to overcome the defense by establishing that the officials' alleged conduct violated clearly established law. *Michalik v. Hermann*, 422 F.3d 252, 262 (5th Cir.2005). The plaintiff may not rely on conclusory allegations and assertions. *Id.* Instead, the plaintiff must show genuine issues of material fact about the reasonableness of the officials' alleged conduct. *Id.*

1. Impermissibly Suggestive Identification

Plaintiff initially argues that his right to due process was violated because the pretrial identification procedure used by Defendants on Carreon and Echemendia was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Pl.'s Resp. to Defs.' Mot. for Summ. J. 6 (quoting *Simmons*

v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)). Defendants generally respond that there is no evidence in this case that Defendants manipulated Echemendia's eyewitness identification "by use of threats, coercion, [or by] revealing key information." Defs.' Mot. for Summ. J. ¶ 33. Additionally, Defendants contend that Plaintiffs due process rights were not infringed since Carreon's pretrial identification "was [not] used or introduced into evidence" at Plaintiffs criminal trial. *See id.*

"[A] suggestive pre-indictment identification procedure does not, in itself, intrude upon a constitutionally protected interest." *Manson v. Brathwaite*, 432 U.S. 98, 113 n. 13, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). "Pretrial identification procedures are constitutional unless the pretrial identification was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law." *Herrera v. Collins*, 904 F.2d 944, 946 (5th Cir.1990) (citing *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)). The Court's examination into the reliability of eyewitness identifications proceeds in two stages. *Id.* Initially, as a threshold inquiry, the Court must determine whether the pretrial identification was impermissibly suggestive. *Joshua v. Maggio*, 674 F.2d 376, 378 (5th Cir.1982). If it was, then the Court must determine whether, "under the totality of the circumstances, the suggestiveness leads to a substantial likelihood of irreparable misidentification." *Herrera*, 904 F.2d at 946. Under the second step of the analysis, the Supreme Court has identified five factors that may help determine the likelihood of irreparable

misidentification: (1) the opportunity of the witness to view the criminal at the crime scene; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Such an analysis is a mixed question of law and fact. *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir.1997); *see also Sumner v. Mata*, 455 U.S. 591, 597, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) ("[T]he ultimate question as to the constitutionality of the pretrial identification procedures ... is a mixed question of law and fact ...."). Having thus delineated this two-tiered test, the Court now turns to its application here.

a. Echemendia

The Court's initial task, as outlined above, is to determine whether Echemendia's pretrial identification of Plaintiff was impermissibly suggestive. As noted earlier, Echemendia identified Plaintiff as Carreon's accomplice in Cobb's murder from a six-person photographic line-up prepared by Detective Terrones. Pl.'s Second Am. Compl. ¶ 40; Terrones Dep. 213:8-10; Martinez Dep. 166:14-18. As a result of Echemendia's pretrial identification, Defendants arrested Plaintiff. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 12, 16. Even though Plaintiff contends that this identification procedure was impermissibly suggestive, the Court finds Plaintiffs claim untenable.

Appendix B

Before providing Echemendia the six-person photographic lineup, Detective Martinez, as evidenced by his police report, admonished Echemendia, explicitly stating that Plaintiff may or may not be present in the photographic lineup. Martinez Dep. 161:18-162:16.

> Before [Echemendia] was shown the line up, [Echemendia] was told that the photographs that he was going to be shown might or might not show one of the persons who were involved in the incident. The detective gave the witness a verbal [a]dmonishment statement. [Echemendia] then viewed the line up. [Echemendia] looked at all of the photographs and picked out the photograph that was in slot number 5. [Echemendia] then told the detectives that the person who the witness had pointed out was the person who he referred to as the Latin male in his statement. [Echemendia] then signed and dated the back of the photograph that [he] had pointed out.

App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 25. Nothing from this statement reveals that Plaintiff's pretrial identification was impermissibly suggestive. Plaintiff's arguments to the contrary are unpersuasive. In an attempt to rebut Defendants' claim, Plaintiff merely asserts, to no avail, that Echemendia's pretrial identification is "disturbing" because (1) Plaintiff "was not involved in Cobb's murder" and (2) "the only reason Defendants had for putting Plaintiff's picture in the lineup was because Plaintiff was associated with [Hernandez], who was associated with Carreon." Pl.'s Resp. to Defs.'

Mot. for Summ. J. 21. Even if the Court were to review these facts in a light most favorable to Plaintiff, *see Reid*, 784 F.2d at 578, Plaintiff has failed to come forward with "specific facts showing that there is a genuine issue" that the six-person photographic lineup that Defendants presented to Echemendia was impermissibly suggestive, *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348.

Nevertheless, even assuming *arguendo* that Defendants' photographic lineup was unduly suggestive, the Court finds, under the totality of the circumstances, that the alleged suggestiveness in this case did not lead to a substantial likelihood of irreparable misidentification. As noted at the outset, to ascertain whether an identification led to a substantial likelihood of irreparable misidentification, courts generally look to five established factors: (1) the opportunity of the witness to view the criminal at the crime scene; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *United States v. Merkt*, 794 F.2d 950, 959 (5th Cir.1986). Two days after Cobb's murder, Echemendia provided a statement to Defendants, rendering an approximate description of Plaintiff as well as a detailed account of his surroundings.[14]

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14. Echemendia's statement to Defendants provided, in relevant part:

> What I saw happened at about 1:30 a.m. early Wednesday morning, 05-11-1994. On that early morning, I was outside of the shop at 9411 Dyer. I was

Additionally, Echemendia seemed to be relatively near the crime scene and thus had ample opportunity to view the perpetrator. Also, Echemendia's vivid statement to the police reveals a high degree of attentiveness during the ordeal. Accordingly, the Court finds that the factors above, taken together, show that any alleged suggestiveness in Plaintiff's identification did not lead to a substantial likelihood of irreparable misidentification.

b. Carreon

Next, Plaintiff contends that Defendants' one-on-one show-up identification of Plaintiff to Carreon was inherently suggestive. Pl.'s Resp. to Defs.' Mot. for Summ. J. 23 (citing *Neil v. Biggers*, 409 U.S. 188, 196-98, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). "Suggestive confrontations,"

> standing [at the southwest corner of] the car wash, [which] is located in the same shopping strip where I work at ... At about that time I saw the three males standing outside of the [v]eterinary shop that is located on the corner of Dyer and Diana.
>
> * * *
>
> The other male was [Plaintiff], a Latin male, 23 to 24 years of age, light brown hair that was very short on the top and on the sides, little facial hair and was wearing beige Khaki type pants that were very baggy, blue button down shirt with long sleeves that was tucked into the pants, but was very loose, and was about three sizes too big for this male.

App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 26.

as here, "are [widely] disapproved because they increase the likelihood of misidentification...." *Neil*, 409 U.S. at 198, 93 S.Ct. 375; *see also Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). Indeed, the Fifth Circuit has consistently admonished officers for using the practice of show-up identifications. *See Joshua*, 674 F.2d at 378 ("It is an understatement to say that 'the practice of showing suspects singly to persons for the purpose of identification ... has been widely condemned.' ") (quoting *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)); *see also V. Allen Estelle*, 568 F.2d 1108, 1112 (5th Cir.1978) ("This Court, along with other circuits, has shown reluctance to encourage the use of showups.") (footnote omitted). Although Defendants concede that they showed Carreon one photograph of Plaintiff instead of a photographic lineup, they claim, as stated before, that the identification procedure was not impermissibly suggestive. Tellingly, Detective Terrones stated that Detective Ruiz, acting pursuant to police procedures, properly provided Carreon a single photograph of Plaintiff because Carreon had already identified Plaintiff by his presumed nickname.

> A: [Detective Terrones:] So at one point, since [Carreon is] saying "Guero, Guero," and he really doesn't know his name, he's shown *one photograph* of [Plaintiff], and he says, "This is the Guero that I'm referring to in my statement." Okay. And-
>
> Q: [Plaintiff's counsel:] Why did they-why did you guys show him one photograph of [Plaintiff]?

A: Because he said he knew him for several months. So he knows this person, maybe not by name, but with the photograph-

Terrones Dep. 129:12-21 (emphasis added).

Detective Ruiz, the detective responsible for providing Carreon with a single photograph of Plaintiff, shares Detective Terrones's recollection:

Q: [Plaintiff's counsel:] Okay. So when you went to speak to Carreon, [Detective] Tabullo had already been speaking to him?

A: [Detective Ruiz:] I believe-my recollection is that Detective Tabullo had already obtained a confession statement from Carreon.

Q: And then what was your involvement at that point with Carreon?

A: I was to show him a photograph of a-of an individual that was possibly Guero.

Q: And whose photograph was that?

A: That was [Plaintiff].

***

Q: ... This showing a single photograph to Carreon, would you consider that a one-to-one identification?

A: In a sense, yeah.

***

Q: Whose decision was it, if you know, to conduct this identification of [Plaintiff] with Carreon? Was that your decision?

A: Recalling back, I believe it was Sergeant Ocegueda that instructed me to meet with Carreon and present him with a photograph, to see if he could identify the person in the photograph.

***

Q: Okay. So your understanding was, at this point, Carreon had described an individual as being with him during the murder, correct?

A: That is correct.

***

Q: When you met with Carreon, what did you say to Carreon?

A: I met with Carreon. I readvised him of his rights, ongoing rights, and I asked him to view this photograph and to let me know if he knew the person in that photo.

Ruiz Dep. 71:5-15, 73:23-74:1, 74:24-75:5, 77:20-23.

However, contrary to the allegations of Detectives Terrones and Ruiz, Carreon stated, in an affidavit, that the detectives coerced him into misidentifying Plaintiff:

> On May 13, 1994, I was arrested for murder. At the time, I was seventeen (17) years old. It was the first time in my life I had ever been arrested or questioned by police ... *The police coerced me into signing a false confession and misidentifying [Plaintiff] with promises that if I did, I would be released.* A detective showed me one picture and told me, "This is Mr. Hernandez. This is Guero, just signed the back of the picture and we'll let you go.
>
> I tried telling the detective that I did not know Mr. Hernandez and that I has [sic] not seen him kill anyone. However, the detective became angry repeatedly saying that Mr. Hernandez was Guero. I did not know Mr. Hernandez, so I figured the police knew it was him. I wanted to be released, so I signed the picture. I honestly believed the police would let me go. I saw Mr. Hernandez for the first time ever in the picture detective showed me. Prior to that day, I had never seen Mr. Hernandez before ... Ever since the conviction of Mr. Hernandez, I have lived with the uncomfortable thought that my involuntary statement and misidentification may have played a role in the imprisonment of an innocent man.

App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 6 (emphasis added).

Accordingly, after juxtaposing Carreon's affidavit with the depositions of Detectives Terrones and Ruiz, the Court finds that there is a genuine issue of material fact as to whether the pre-indictment identification procedure was impermissibly suggestive. Because the Court must review the facts drawing all inferences most favorable to the non-movant, the Court resolves this factual issue in Plaintiff's favor. *Reid*, 784 F.2d at 578.

While the indicia of suggestiveness appears to point in Plaintiff's favor, the Court must now determine whether Defendants' suggestiveness led to a substantial likelihood of irreparable misidentification. The Court concludes that it does. After Carreon's initial confession, Detective Ruiz, under the direction of Sergeant Ocegueda, returned to Carreon and showed him a single photograph of Plaintiff. Pl.'s Second Am. Compl. ¶ 44; App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 23. According to Carreon, Detective Ruiz "placed the picture in front of him and specifically instructed him: 'This is Mr. Hernandez. This is ["Guero"], just sign the back of the picture and we'll let you go.'"[15] Pl.'s Resp. to Defs.' Mot. for Summ. J. 23. Nevertheless,

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15. Detective Ruiz, contrary to Carreon and Plaintiff's allegations, denies having coerced Carreon into misidentifying Plaintiff:

> Q: [Plaintiff's counsel:] And if Carreon were to testify that you told him, "This is Guero, isn't it," you would dispute that testimony?
>
> A: [Detective Ruiz:] I would say he's lying, yes, sir.
>
> Ruiz Dep. 81:10-82:2.

contrary to Defendants' assertion, Plaintiff argues that his bona fide nickname, as evidenced by the police's records management system, was "Gato"-not "Guero."[16] *See id.* at 22.

> Q: [Plaintiff's counsel:] Could you explain to the Court what Exhibit 2 is, [Detective] Terrones?
>
> A: [Detective Terrones:] It's an arrest supplement.
>
> * * *
>
> Q: Under "suspect's name," what did you write?
>
> A: Nickname and the name of "Gato."
>
> Q: Above that, "suspect's name"?
>
> A: "Hernandez, Alejandro."
>
> * * *

---

16. In addition to the police's records management system, Hernandez, the man who the police had previously arrested for attempting to shoplift a pair of jeans at a Mervyn's Department Store with Plaintiff, knew Plaintiff as "Gato."

> I met [Plaintiff] in 1994 ... In all the time I knew [Plaintiff] I never knew him to be known by the name "Guerro" [sic] instead everyone called him "Gato" because of his eyes.
>
> App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 2

Q: Where did you get "Gato"?

A: From the [police's records management system].

Q: Why not "Guero"?

A: I have no idea.

Q: I mean your chief witness here is calling him "Guero."

A: Right.

* * *

Q: If I were able to provide witnesses that-that knew [Plaintiff] and said, "He was not known by the name of 'Guero.' Everybody I knew that knew [Plaintiff] knew him by 'Gato;' nobody knew him by the name of 'Guero,'" would you be able to provide any witnesses, as we sit here today, that could tell me they knew [Plaintiff] by the name of "Guero"?

* * *

A: I don't have any knowledge of anybody else.

Terrones Dep. 129:12-21, 132:15-136:2.

The record, when construed in a light most favorable to Plaintiff, reveals that Plaintiff's identification was

unreliable since his presumed nickname, as Detective Terrones apparently admits, was "Gato"-not "Guero." Accordingly, the Court concludes that Defendants' pretrial identification procedure was, when viewed under the totality of the circumstances, impermissibly suggestive because Defendants strong-armed Carreon into misidentifying Plaintiff and gave rise to a substantial likelihood of irreparable misidentification.

2. **Reckless Investigation**

Plaintiff subsequently alleges that Defendants deprived him of his liberty without due process of law by conducting a reckless investigation and deliberately ignoring exculpatory evidence in his underlying criminal case. Pl.'s Resp. to Defs.' Mot. for Summ. J. 8 (citing *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir.1992)). Defendants underscore that "[d]ue process does not require that every conceivable step be taken at whatever cost to eliminate the possibility of convicting an innocent person." Defs.' Mot. for Summ. J. ¶ 26 (citing *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)).

As a preliminary matter, the Court is mindful that there does not exist a cognizable tort claim for a police's negligent failure to investigate. *Sanders*, 950 F.2d at 1161-62; *United States v. Martin*, 615 F.2d 318, 329 (5th Cir.1980) (noting that negligence does not constitute a violation of a clearly established constitutional right). In fact, once police establish probable cause, as here, the police are neither required to "investigate independently every claim of innocence," nor compelled "by the

Constitution to perform an error-free investigation of such a claim." *Baker v. McCollan*, 443 U.S. 137, 145-46, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). However, an official may be exposed to liability under § 1983 if he deliberately ignores exonerative evidence or conducts a reckless investigation. *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir.1992).

In this case, Plaintiff has adduced evidence showing, as illustrated above, that Defendants hectored Carreon into implicating Plaintiff by promising to release him if he identified Plaintiff as his accomplice. App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 6. Moreover, Carreon, in support of Plaintiff's claim, states that Detective Tabullo fabricated his confession to the police.

> The so-called confession which became my alleged statement was totally fabricated by [Detective] Tabullo. He wrote the statement then typed it. He kept telling me just agree to the statement and sign it and I promise I'll let you go. He then brought in Detectives Terrones and Ruiz. After I signed the statement, [Detective] Tabullo put the handcuffs on me. I said I thought you were going to let me go. [Detectives] Terrones, Ruiz, and Tabullo started laughing at me. I felt betrayed because I knew [Detective] Tabullo had lied to me about letting me go. They then took me to a bench and sat me next to [Plaintiff].
>
> *Id.* at 45.

Besides this seemingly reckless behavior, Plaintiff avers that, after Carreon saw Plaintiff for the first time, Carreon insisted to Detectives Terrones and Ruiz that he did not know him, Terrones Dep. 180:25-181:6; however, the detectives seemingly ignored his plea, Pl.'s Second Am. Compl. ¶ 45.

> Q: [Defendants' counsel:] Did you-I understand it's your position that when you were in the backseat of the patrol car-mean, the detectives' car, and Detective Terrones and Detective Ruiz were driving you from-you know what "Five Points" means, right?
>
> A: [Plaintiff:] Yes, sir.
>
> Q: And they were driving you from Five Points down to where the municipal court judges are, that [Carreon] said, "I don't know this guy. This isn't Guero." Did he say that?
>
> A: Something to that effect. He said, "This isn't him."
>
> Q: Okay. And did these detectives respond?
>
> A: Detect-you know, at first I couldn't tell who was who, because I hadn't seen them.
>
> Q: Right. We've been here-
>
> A: But now that I've seen them-

Q: We're on our fourth day here.

A: It was Detective Ruiz.

Q: What did he say?

A: Detective Terrones didn't say anything.

Q: Okay.

A: He stayed quiet, you know, act like-he just ignored it, what, you know, Carreon was saying.

Q: Okay.

A: Detective Ruiz said, you know, "That's something you're going to-you can't-you can't change it anymore. That's something you're going to have to tell the judge." That's what he said.

Pl.'s Dep. 30:14-31:17.

Although Detective Ruiz adamantly denies Plaintiff's allegation or simply does not recollect Carreon notifying him of his inability to recognize Plaintiff,[17] the Court,

17. Detective Ruiz, as mentioned above, claims he has no knowledge of Carreon's recantation:

> Q: [Plaintiff's counsel:] Okay. And at-at any time while you were with Carreon, after he signed the confession, did he tell you, "You know what? I don't know [Plaintiff]"?

merely for purposes of this motion, must draw these statements in a light most favorable to Plaintiff. Viewed in that context, the Court therefore concludes that the facts alleged by Plaintiff are sufficient to make out a cognizable claim of reckless investigation.

3. Failure to Disclose *Brady* Exculpatory Evidence

Furthermore, Plaintiff alleges that Defendants cannot avail themselves of qualified immunity because they failed to disclose *Brady* exculpatory evidence relating to (1) the lack of association between Carreon and Plaintiff, (2) the collusive origin of Carreon's confession and identification, and (3) Carreon's presumed recantation. Pl.'s Resp. to Defs.' Mot. for Summ. J. 15-17, 24. The Court agrees.

Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the government may not

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A: [Detective Ruiz:] No, sir.

Q: At any time that evening, after he signed the confession, did he recant that confession to you?

A: No, sir.

Q: At any time while you were with Carreon, after he signed that confession, did you overhear a conversation between Carreon and [Plaintiff] where Carreon might have told him, "I don't know you"?

A: No, sir, not to my recollection.

Ruiz Dep. 83:16-84:3.

withhold evidence that is favorable to a criminal defendant. *United States v. Walters*, 351 F.3d 159, 169 (5th Cir.2003). This constitutional mandate rightfully extends to police officers.[18] *See, e.g., Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th Cir.1988) (holding that "a police officer cannot avail himself of a qualified immunity defense if he ... deliberately conceals exculpatory evidence, for such activity violates clearly established constitutional principles"); *see also Brown v. Miller*, 519 F.3d 231, 237-38 (5th Cir.2008) . As such, to establish a *Brady* violation, a criminal defendant must show (1) that the police suppressed evidence; (2) that the evidence was favorable, such as exculpatory or impeachment evidence; and (3) that the evidence was material. *See Mahler v . Kaylo*, 537 F.3d 494, 499-500 (5th Cir.2008). Moreover, a criminal defendant must establish that his failure to discover the evidence was not the result of a lack of due diligence. *See United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir.1997) ; *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir.1990). Where a criminal defendant fails to establish any one element of *Brady*, courts need not

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18. Although the Supreme Court has not directly addressed this issue, several circuit courts, including the Fifth Circuit, have found it to be a violation of procedural due process where police withhold exculpatory evidence from prosecutors. *See generally Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir.2004), *cert. denied* 543 U.S. 1153, 125 S.Ct. 1345, 161 L.Ed.2d 117 (2005); *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir.2001); *Jean v. Collins*, 221 F.3d 656, 659 (4th Cir.2000) (Wilkinson, C.J., concurring) (en banc); *McMillian v. Johnson*, 88 F.3d 1554, 1569 (11th Cir.1996), *cert. denied* 521 U.S. 1121, 117 S.Ct. 2514, 138 L.Ed.2d 1016 (1997); *Walker v. New York*, 974 F.2d 293, 299 (2d Cir.1992); *Brady v. Dill*, 187 F.3d 104, 114 (1st Cir.1999).

inquire into the other components. *See United States v. Runyan*, 290 F.3d 223, 245 (5th Cir.2002); *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir.2000).

Of the *Brady* components illustrated above, materiality "is generally the most difficult to prove." *Mahler*, 537 F.3d at 500. In assessing materiality, courts must determine "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir.2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 290, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). The Fifth Circuit has summarized this materiality inquiry as follows:

> [t]he Supreme Court has imposed four criteria for determining whether evidence is material. First, materiality does not require the defendant to demonstrate by a preponderance of the evidence that omitted evidence would have resulted in acquittal. Second, he need not weigh the withheld evidence against the disclosed evidence to show he would have been acquitted by the resulting totality. Third, if evidence is found material, there is no need to conduct a harmless error analysis. Fourth, the withheld evidence should be considered as a whole, not item-by-item.

DiLosa v. Cain, 279 F.3d 259, 263 (5th Cir.2002) (citing *Kyles v. Whitley*, 514 U.S. 419, 434-37, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Indeed, "[t]he sum of

these four guideposts means that, to show a due process violation when the state withholds evidence, a defendant need not prove that his trial necessarily would have had a different outcome; a lack of faith in the result is sufficient." *Id.* As such, materiality depends largely on the value of the suppressed evidence relative to evidence that the government disclosed. *Sipe*, 388 F.3d at 478. The reviewing court applies the materiality inquiry to the withheld evidence "collectively, not item by item." *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555.

In this case, acting initially on a mere "hunch,"[19] Detective Terrones linked Plaintiff to Cobb's murder.

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19. The record in this case establishes that Defendants myopically focused on Plaintiff's prior arrest for stealing a pair of jeans with Hernandez and drew inferences from that association.

> Q: [Plaintiff's counsel:] Okay. You don't have any indication-under the Mervyn's Department Store, where [Plaintiff] is-is associated with him, that that was violent in any way, do you?
>
> A: [Detective Terrones:] No.
>
> Q: And yet, you chose to-to take and pull [Plaintiff's] name out of here for a shoplifting charge ... ?
>
> A: Yes.
>
> Q: And as you ... sit here today, can you tell the Court why you chose [Plaintiff] ... ?
>
> * * *

Appendix B

Terrones Dep. 188:5-22. In making this connection, Detective Terrones associated Plaintiff with Hernandez, the man who police had previously arrested for attempting to shoplift a pair of jeans at a Mervyn's Department Store with Plaintiff. Pl.'s Second Am. Compl. ¶ 32. Since Hernandez was associated with Carreon, Detective Terrones then assumed that Plaintiff, by way of association, also knew Carreon. Pl.'s Resp. to Defs.' Mot. for Summ. J. 15-16. After making this recondite connection, Detective Terrones, along with Detective Zimmerly, went to the El Paso County Detention Facility to interview Hernandez. Zimmerly Dep. 58:1-8. At the completion of the interview, Detective Zimmerly made a report. App. in Support of Defs.' Mot. for Summ. J.G. Plaintiff argues that "[Detectives] Terrones and Zimmerly were well aware [that] Plaintiff and his then-alleged accomplice, [Carreon], did not know each other." Pl.'s Resp. to Defs.' Mot. for Summ. J. 15. Plaintiff goes on to say that Hernandez, "[t]he very individual [Detective] Terrones used to connect Plaintiff and Carreon informed Defendants of this fact, but this information is conspicuously absent from [Detective] Zimmerly's report...." *Id.* at 15-16. Hernandez, by affidavit, endorses Plaintiff's allegation, stating in relevant part:

A: A hunch maybe. I don't know.

Q: A hunch? But you don't know for sure?

A: No.

Terrones Dep. 188:5-22.

Appendix B

> The white detective started by telling me that [Plaintiff] and [Carreon] had been arrested for capital murder ... That shocked me when the detective put those two names together and I knew the detective was lying to me. *I told the detective that couldn't be true because I knew both [Plaintiff] and [Carreon] but I knew for a fact that [Plaintiff] and [Carreon] did not know each other....*
>
> App. to Pl.'s Resp. to Defs.' Mot. for Summ. J. 2 (emphasis added).

Defendants offer no direct rejoinder to this allegation. The Court therefore is left to determine whether this exculpatory evidence is material. As Supreme Court precedent directs, the Court proceeds with an evaluation of "the tendency and force of the undisclosed evidence." *Id.* at 437 n. 10, 115 S.Ct. 1555. A review of the withheld evidence reveals that disclosure of Hernandez's statement "would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." *Kyles*, 514 U.S. at 441, 115 S.Ct. 1555. Had Defendants honored their *Brady* obligations by disclosing Hernandez's complete statement, then the value of Echemendia's eyewitness testimony would have been substantially reduced, if not obliterated. That is to say, if Defendants had disclosed Hernandez's statement that Plaintiff and Carreon had never met, then Echemendia's eyewitness statement implicating both to Cobb's murder would have been undermined. Moreover, the demise of Echemendia as a credible prosecution witness would have done more

than just nullify his testimony; it would also have served to discredit generally the police methods employed in assembling the case against Plaintiff, calling into question the veracity of testimony of other prosecution witnesses. As the Fifth Circuit aptly explained, the consequences of destroying one eyewitness, as Echemendia, extend beyond just that witness:

> We are tempted, but not persuaded, by this arithmetical approach; our experience at the bar has been that positive identification by two unshaken witnesses possesses many times the power of such an identification by one only, and that the destruction by cross-examination of the credibility of one of two crucial witnesses-even if other remains untouched-may have consequences for the case extending far beyond the discrediting of his own testimony.

Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir.1985).

Since there was no physical evidence linking Plaintiff to Cobb's murder, the entire criminal case against Plaintiff mainly consisted of Echemendia's eyewitness account. Terrones Dep. 196:23-197:20, 216:8-14. Because the criminal case against Plaintiff relied almost exclusively on eyewitness identification, the materiality of Hernandez's statement, which calls into question Echemendia's eyewitness testimony, compels a materiality finding. The withheld evidence need not touch every prosecution witness and every item of incriminating evidence before materiality is satisfied. To be sure, "the effective

impeachment of *one eyewitness* can call for a new trial even though the attack does not extend directly to others." *Kyles*, 514 U.S. at 419, 115 S.Ct. 1555 (citing *United States v. Agurs*, 427 U.S. 97, 112-13 n. 21, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)) (emphasis added). Thus, considering the withheld evidence as a whole, the Court concludes that Hernandez's statement is material.

However, the Court's inquiry is not finished. Plaintiff further contends that Defendants also failed to disclose *Brady* evidence relating to Carreon's presumed recantation. Pl.'s Resp. to Defs.' Mot. for Summ. J. 15-17; Pl.'s Dep. 30:14-31:17. Defendants, by virtue of Detective Terrones's statement, apparently acknowledge that, if Carreon recanted his identification of Plaintiff as his purported accomplice, then this would indeed be *Brady* material.

> Q: [Plaintiff's counsel:] So if [Carreon], the co-defendant, turns around and says, "You know what? Now that I'm in the car with him, and I'm looking at him, I'm telling you, this is not the guy. This is not-I don't know this person." Now, is that information that would tend to show that he's innocent?
>
> A: [Detective Terrones:] No.
>
> Q: Now, let me ask you-I'm not asking would you tend to believe he's innocent, but *could you see where a jury might take that as evidence of his innocence?*

A: *They could.*

Q: *So, then, if a jury could consider that as being part of evidence of-of a person's innocence, then is that exculpatory?*

A: *It could be, yes.*

***

Q: [N]owhere in the paperwork can you find where any detective documented or reported [Carreon] saying, "I don't know [Plaintiff]"?

A: That is correct.

Q: And you have no information or no evidence today to show that that information would have been given to prosecutors, that if [Carreon] said that-and I understand we're not establishing today that [Carreon] did say it or didn't say it-but if [Carreon] said it, you have no indication that that information was ever given to prosecutors?

A: Yes.

Terrones Dep. 137:23-138-12, 182:25-183-11 (emphasis added).

Even though the parties sharply dispute whether Carreon actually recanted his identification of Plaintiff,

the Court is obliged to construe the facts in Plaintiffs favor. Given this finding, the Court concludes that Carreon's presumed recantation is exculpatory and, like Hernandez's statement, also material.

D. Civil Conspiracy

Next, Plaintiff alleges that Defendants' actions "were motivated by a class-based animus [that resulted in the] conscious and deliberate choice to proceed with the investigation and prosecution [against Plaintiff] over reliable leads that indicated a third Caucasian person was involved." Pl.'s Resp. to Defs.' Mot. for Summ. J. 9-10. To state a color able claim under 42 U.S.C. § 1985(3),[20]

---

20. Although Plaintiff couches his claim under § 1985(2), it seems, based on his pleadings, that he actually intends to bring a claim under § 1985(3). Section 1985(2) addresses conspiracies to interfere with proceedings in federal court, while § 1985(3) addresses conspiracies to deprive a person of the equal protection of the law, or equal privileges and immunities under the law, when such conspiracies are motivated by racial animus. *See, e.g., Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 757 (5th Cir.1987) (citing *Daigle v. Gulf State Util. Co., Local 2286*, 794 F.2d 974, 978-79 (5th Cir.1986)). Section 1985(3) reads in relevant part:

> If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal

a plaintiff must demonstrate (1) the existence of a conspiracy, (2) for the purpose of depriving a person or class of persons of equal protection of the laws in a state court proceeding, (3) an act in furtherance of a conspiracy, and (4) an injury to persons or property or a deprivation of a right or privilege granted to U.S. citizens. *United Bhd. of Carpenters and Joiners of Am. Local 610 AFL-CIO v. Scott*, 463 U.S. 825, 828-29, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983). In so doing, a plaintiff must also show that the conspiracy was motivated by a class-based animus. *Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261, 271 (5th Cir.2001) (citing *Bryan v. City of Madison*, 213 F.3d 267, 276 (5th Cir.2000)).

In this case, Plaintiff has adduced no evidence that Defendants' actions were motivated based on his membership in a protected class of persons. *Scott*, 463 U.S. at 835, 103 S.Ct. 3352 (" 'The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.") (quoting

---

protection of the laws ... or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)). Although Plaintiff claims that Defendants' actions were "motivated by a class-based animus [since they] failed to investigate leads that would have implicated a Caucasian male," Pl.'s Resp. to Defs.' Mot. for Summ. J. 34-35, Plaintiff furnishes no support for this conclusory allegation, *Harris v. Ashby*, 2001 U.S. Dist. LEXIS 12113, at *17 (N.D.Tex. Mar. 5, 2001) (finding that conclusory allegations of a race-based conspiracy are insufficient to support a viable § 1985(3) claim). Without evidence showing otherwise, the Court is unpersuaded that Defendants, a group of Mexican-American police officers, harbored any racial animus towards Plaintiff, a Mexican-American.[21] Thus, Plaintiff's conspiracy claim lacks any factual support that Defendants, motivated by racial animus, conspired to deprive Plaintiff of equal protection under the laws. Accordingly, the Court dismisses Plaintiff's § 1985(3) conspiracy claim.

---

21. Moreover, the record is similarly devoid of any evidence tending to show the existence of a conspiracy. Mere conclusory allegations of the existence of a conspiracy are insufficient to support a claim of federal conspiracy. *Priester v. Lowndes County*, 354 F.3d 414, 420 (5th Cir.2004); *see also Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir.1987) ("Plaintiffs who assert conspiracy claims under civil rights statutes must plead the *operative facts* upon which their claim is based. Bald allegations that a conspiracy existed are insufficient.") (emphasis added). Plaintiff has failed to prove that the alleged co-conspirators agreed, either expressly or tacitly, to commit acts to deprive him of equal protection under the law. *Garrison v. City of Texarkana, Texas*, 910 F.Supp. 1196, 1207 (E.D.Tex.1995) ("To prove the existence of a conspiracy under this statute, the plaintiff must allege and establish facts showing a meeting of the minds.").

E. State Law Claims

Turning to state law, Plaintiff originally brought state law claims of intentional infliction of emotional distress,[22] malicious prosecution,[23] and civil conspiracy.[24] Pl.'s First Am. Compl. ¶¶ 81-90. Since the filing of Defendants' motion for summary judgment, Plaintiff's remaining state law claim is for civil conspiracy. Pl.'s Second Am. Compl. ¶¶ 79-83.

1. Civil Conspiracy

The elements of a civil conspiracy claim in Texas are: "(1) two or more persons; (2) an object to be accomplished;

---

22. On November 6, 2008, Plaintiff filed his "Second Amended Complaint and Jury Demand." Docket No. 65. Because Plaintiff apparently dropped his state law claim for intentional infliction of emotional distress in his Second Amended Complaint, the Court will not consider it.

23. As previously noted, on October 27, 2008, the Court dismissed Plaintiff's malicious prosecution claim. *See supra* note 3.

24. "Texas law of official immunity is substantially the same as federal qualified immunity law." *Wren v. Towe*, 130 F.3d 1154, 1160 (5th Cir.1997). Under Texas law, law enforcement officers are entitled to official immunity for conduct that is "(1) within the scope of their authority (2) in performing their discretionary duties (3) in good faith." *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 424 (Tex.2004). An officer's decision to arrest is discretionary. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex.1994). An officer acts with good faith when "a reasonably prudent officer, under the same or similar circumstances, could have believed that his conduct was justified based on the information he possessed when the conduct occurred." *Telthorster v. Tennell*, 92 S.W.3d 457, 465 (Tex.2002).

(3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex.1983). A plaintiff asserting such a claim must prove that the defendants conspired to accomplish an unlawful purpose or used unlawful means to accomplish a lawful purpose. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex.1996).

Government officials in Texas are officially immune from liability for the performance of their (1) discretionary duties (2) in good faith (3) as long as they are acting within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994) . A discretionary function-as distinguished from a ministerial duty, which requires rote obedience to orders or performance of a function to which the actor has no choice-involves personal deliberation, decision, and judgment. *Id.* at 654 (citation omitted). An officer acts in good faith if a reasonably prudent officer, under the same circumstances, could have believed that his actions were correct. *Id.* at 656. An officer acts within the scope of his authority when he discharges the duties generally assigned to him. *Id.* at 658. To obtain official immunity on summary judgment, an official must prove that a reasonably prudent official might have believed that his action was appropriate under the circumstances. *Id.* Even if an official's actions were taken negligently, that would not be sufficient to defeat a showing of good faith. *Id.* at 655. The test for good faith is objective and is substantially derived from the test for good faith in a qualified immunity claim for federal constitutional violations. *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 413 (5th Cir.2002).

In light of the Court's holding that Defendants are immune from Plaintiff's § 1985(3) conspiracy claim, the Court also determines, by conducting the analogous state law inquiry under Texas state law, that Defendants are likewise immune from Plaintiff's state law conspiracy claim.

V. CONCLUSION

Based on the foregoing, the Court is of the opinion that Defendant's motion for summary judgment should be granted in part and denied in part. In this vein, the Court concludes that Plaintiff's state and federal claims for civil conspiracy should be dismissed.

Accordingly, **IT IS ORDERED** that Defendants' "Motion for Summary Judgment" (Docket No. 33) is **GRANTED IN PART AND DENIED IN PART.**

IT IS FURTHER ORDERED that Defendants' "Motion to Strike Affidavit and to Exclude Plaintiffs [sic] Expert Witness Troy Wilke" (Docket No. 76) is **DENIED AS MOOT.**[25]

---

25. Because the parties' expert affidavits are immaterial to the disposition of this Order, the Court denies them as moot. However, regarding Defendants' "Motion to Strike Affidavit and to Exclude Plaintiffs [sic] Expert Witness Troy Wilke," the Court notes that it only denies as moot the portion of Defendants' motion that relates to their request to strike Troy Wilke's affidavit. The remaining portion of Defendants' motion pertaining to their request to strike Troy Wilke as an expert witness is denied without prejudice to its refiling.

IT IS FINALLY ORDERED that Plaintiff's "Motion to Strike Certain Opinions of the Affidavit of Defendants' Expert Witness Robert Taylor" (Docket No. 79) is **DENIED AS MOOT.**

END OF DOCUMENT

APPENDIX C — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-50659

ALEJANDRO HERNANDEZ,

Plaintiff-Appellee

v.

JESUS TERRONES, In his individual and official capacity; GUILLERMO MARTINEZ, In his individual and official capacity; ARTURO RUIZ, JR., In his individual and official capacity; ANTONIO TABULLO, In his individual and official capacity; JOE ZIMMERLY, In his individual and official capacity; PEDRO OCEGUEDA, In his individual and official capacity,

Defendants - Appellants

Appeal from the United States District Court for the Western District of Texas, El Paso

ON PETITION FOR REHEARING EN BANC

(Opinion ____, 5 Cir., ___ , ____, F.3d ____)

Appendix C

Before JONES, Chief Judge, PRADO, Circuit Judge, and OZERDEN*, District Judge.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. App. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

* Judge Halil S. Ozerden, district judge, Southern District of Mississippi, sitting by designation.

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(2)

No. 10-1043

SUPREME COURT, U.S.
FILED
MAR 21 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ALEJANDRO HERNANDEZ,

Petitioner,

v.

JESUS TERRONES, GUILLERMO MARTINEZ, ARTURO RUIZ, JR., ANTONIO TABULLO, JOE ZIMMERLY, AND PEDRO OCEGUEDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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March 21, 2011

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QUESTION PRESENTED

Whether the Supreme Court of the United States is going to expand a cause of action for claimed violation of 42 U.S.C. § 1983 constitutional rights beyond well established case law concerning the Fourth Amendment and Fourteenth Amendment of the United States Constitution to include non-constitutional rights claims for reckless investigation or to require law enforcement investigators to continue their investigation through the trial of the case.

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STATUTES

42 U.S.C. § 1983 1

STATEMENT OF THE CASE

In a well reasoned, thorough opinion, the Fifth Circuit Court of Appeals correctly ruled that there was no Fourth Amendment violation, that there was no Fourteenth Amendment violation, and that in 1994, reckless investigation was not a clearly established stand alone constitutional right.

REASONS FOR DENYING THE PETITION

I. The Lower Court's Ruling Granting Respondents' Qualified Immunity Does Not Warrant Review By This Court.

A. In The Proceedings Below, It Was Decided That The Claim Against Respondents Implicated The Fourth Amendment.

1. The core concept in civil rights litigation is that public officials who act within the scope of their discretionary authority and in the course of their official responsibilities are entitled to the defense of qualified immunity, which shields them from suit as well as from liability for civil damages under 42 U.S.C. § 1983 so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known at the time they acted. *Anderson v. Creighton*, 483 U.S. 635 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

2. In this case, Petitioner is attempting to pound a square peg into a round hole. Petitioner's state court conviction was overturned because his criminal defense attorney was ineffective by not producing at trial the very things Petitioner is now claiming Respondents withheld. The Lower Court properly decided that the cognizable constitutional claim was Fourth Amendment probable cause and not a non-cognizable claim of reckless investigation. (Pet. App. 29a). The proper and correct factual background in this case was set out in the lower court's opinion. (Pet. App. 2a-12a).

Petitioner's continued reference to the Fifth Circuit's supposed standard – that the evidence obliterate any link between the Petitioner and the crime – is not a correct statement of the lower court's opinion. The paragraph in Petitioner's Appendix at page 29a on how a reckless investigation was not a clearly established stand-alone constitutional right violation at the time of the events in question in 1994 is not the complete sentence. After that phrase the lower court continues, "and because the incriminating evidence which remains was sufficient to support the existence of probable cause, Petitioner cannot demonstrate the violation of his constitutional right to be free from false arrest or illegal detention." (Pet. App. 29a).

B. The Facts In This Case Do Not Warrant Review By This Court For Resolving Conflicts In The Circuits.

1. This Court has held that to determine whether a Defendant's Fourteenth Amendment due process rights are violated by the admission of evidence at trial derived from unnecessarily suggestive identification procedures depends upon the totality of the circumstances surrounding those procedures. *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), overruled on other grounds by *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). In *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), this Court described the standard under the Due Process Clause as one of fairness, and identified the interest protected in Stovall as evidentiary. *Manson*, 432 U.S. at 113. This Court noted that a "suggestive pre-indictment identification procedure does not in itself intrude upon a constitutionally protected interest," *Id.* at 113 n. 13, and held that "reliability is the linchpin" in determining the admissibility of such identification testimony, *Id.* at 114. In assessing the reliability of an identification and evaluating whether there exists a high likelihood of misidentification, a number of factors should be considered. *Id.* (citing *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). This analysis is in turn determinative of whether the evidence should be permitted to go to the jury. See *Biggers*, 409 U.S. at 201. Both *Stovall* and *Manson* reflect "the concern

that the jury not hear eyewitness testimony unless that evidence has aspects of reliability." *Manson*, 432 U.S. at 112 (emphasis added).

"It is undisputed that Carreon invoked his Fifth Amendment right against self-incrimination, and refused to testify at both Petitioner's examining trial and trial. His identification of Petitioner was not the sole basis for the probable cause determination in seeking Petitioner's arrest and detention." (Pet. App. 34a). Since Carreon's identification was never introduced at either the examining trial or trial, and did not serve as the basis for his continued detention or eventual conviction at trial, Petitioner's due process rights were not violated. Petitioner's argument that Carreon's pretrial identification of Petitioner was either unduly suggestive or intentionally manipulated, is immaterial because the identification was not "clearly critical" to the probable cause determination supporting Petitioner's arrest and detention, nor was it ever admitted into evidence at trial. (Pet. App. 34a).

2. Furthermore, the record reflects, that Petitioner was present and overheard Carreon's recantation of his identification of Petitioner as they were both being driven to the magistrate on the night of their arrest. It is also clear that Petitioner's criminal defense counsel knew of the presumed recantation before his trial in October 1994, and at least as early as May 24, 1994, the date of Petitioner's examining trial. (Pet. App. 8a, 42a and 43a).

C. Respondents Did Not Violate Their Fourteenth Amendment *Brady* Obligations.

1. Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the government must disclose material, exculpatory evidence to a criminal defendant. *United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003) (citing *Brady*, 373 U.S. at 87). "A valid Brady complaint contains three elements: (1) the prosecution must suppress or withhold evidence, (2) which is favorable, and (3) material to the defense." *Moore v. Illinois*, 408 U.S. 786 (1972). Impeachment as well as exculpatory evidence fall within Brady's purview. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

"Evidence is not 'suppressed' if the Defendant 'knows or should know of the essential facts that would enable him to take advantage of it.'" *United States v. Mulderig*, 120 F.3d 534 (5th Cir. 1997); *United States v. Shoher*, 555 F.Supp. 346, 352 (S.D.N.Y. 1983). "When information is fully available to a Defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim." *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980), citing *Giles v. Maryland*, 386 U.S. 66, 98 (1967).

2. The failure to disclose evidence which is cumulative does not present a *Brady* violation. *Allridge v. Scott*, 41 F.3d 213, 218 (5th Cir. 1994). Fernando

Antonio Garinian testified at Petitioner's trial that he had never seen Petitioner before. Laura Cortazar, Petitioner's girlfriend, testified that she did not know Carreon and had only heard of him in connection with this case. Petitioner himself testified that he did not know Carreon. (Pl. App. 38a). Nondisclosure of information that is merely repetitious, cumulative, or embellishing of facts otherwise known to defense does not result in a *Brady* violation. *Giles v. Maryland*, 386 U.S. at 98.

3. Petitioner's criminal defense counsel knew or should have been aware of Robert Hernandez's identity prior to the trial based on the district attorney's open file policy. Robert Hernandez was not called to testify as a witness by either side. The record is silent on what attempts, if any, Petitioner's defense counsel made to interview Robert Hernandez prior to trial. (Pl. App. 40a). Therefore, there was no *Brady* violation.

II. Certiorari Is Not Warranted To Address Any Of The Claimed Circuit Conflict Issues Raised By The Petition.

A. This Case Does Not Present The Sort Of Clear, Well Established And Fully Aired Conflict That Warrants Review By This Court.

The cases Petitioner relies on in his Petition are not the same or similar as the facts in this case, where all known exculpatory evidence was present in

the prosecutor's file, but the Petitioner's criminal defense attorney did not make use of or present any evidence concerning any of the defensive issues.

B. There Was No Withholding Of Substantial Exculpatory Evidence By Respondents.

1. On May 14, 1994, later in the day after Petitioner was arrested for the murder, Sgt. Ocegueda received a telephone call from Dee "Baby" Stewart, who advised that a man named Brandon Hamilton had bragged to him about the murder (Pet. App. 9a).

2. On the same day, Hamilton was located and brought to police headquarters for an interview. He denied involvement in the murder but admitted that he had spoken with Cobb a day or two prior to the murder and acknowledged that he had touched some of the items in the vehicle of the deceased as well as the outside of the car. (Pet. App. 10a).

3. Police obtained Hamilton's fingerprints and released him without taking his statement. Two days later police learned that Hamilton's fingerprints were a positive match for the latent fingerprints which were found on the car. (Pet. App. 10a).

4. On May 27, 1994, police obtained a formal statement from Stewart, which detailed his allegations. (Pet. App. 10a).

5. On June 3, 1994, police took Hamilton into custody and obtained a formal statement from him. (Pet. App. 10a).

6. On June 10, 1994, Hamilton was transported to a medical center where his body fluids and blood samples were submitted for testing (Pet. App. 11a).

7. On May 24, 1994, at Petitioner's Examining Trial, his attorney advised the Magistrate Judge that he intended to call Carreon as a witness for the purpose of repudiating his identification of Petitioner as a co-participant in the murder. Carreon invoked his Fifth Amendment right not to testify. (Pet. App. 11a).

8. Petitioner's criminal trial commenced on October 17, 1994. Carreon again invoked his Fifth Amendment right not to testify and his identification of Petitioner was never introduced at trial. (Pet. App. 12a).

9. At the trial, Laura Cortazar, Fernando Antonio Garinian, a friend of Carreon, as well as Petitioner himself, all testified to the fact that Petitioner and Carreon did not know each other. (Pet. App. 12a).

10. After serving nearly 13 years of a 99-year sentence, Petitioner obtained Habeas Corpus relief on grounds of ineffective assistance of counsel. (Pet. App. 12a).

C. This Case Is Not The Same Or Similar To Any Of The Other Cases Cited By Petitioner As Raising A Conflict In The Circuits.

1. There is no manufactured false evidence created by law enforcement in this case. There are no actions by the police that shock the conscience.

2. The cases cited by Petitioner (all but two which are post-1994) deal with willful, intentional, malicious conduct, which is not present here.

3. This Court has always been reluctant to expand the concept of substantive due process. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The Court also exercises the utmost care whenever asked to break new ground in this field. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). This Court should stay true to these concepts and decline to accept Writ of Certiorari in this case.

CONCLUSION

Because this case was decided in accordance with well established precedent of this Court and because the facts in this case do not present a conflict with other circuits, and for the reasons and based on the authorities cited herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 21, 2011

185 (3)

Supreme Court, U.S.
FILED
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No. 10-1043

IN THE

Supreme Court of the United States

ALEJANDRO HERNANDEZ,

Petitioner,

v.

JESUS TERRONES, GUILLERMO MARTINEZ, ARTURO RUIZ, JR., ANTONIO TABULLO, JOE ZIMMERLY, AND PEDRO OCEGUEDA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

Respondents never dispute that a mature split of authority exists regarding the appropriate standard for establishing a pretrial due process claim. Instead, they contend that this Court need not resolve the issue here because Petitioner supposedly lacks the ability to prove that Respondents manufactured evidence, or did so willfully, as required to establish such a claim. Respondents' attempt to muddy the waters, however, is belied by the record. Alternatively, Respondents argue that this Court should decline to recognize a pretrial due process claim because to do so would expand the scope of substantive due process. Respondents are free to press this argument on the merits, but it is no reason to deny review here. Mr. Hernandez's petition should be granted.

I. Respondents Have Not Challenged the Existence of a Circuit Split.

Noticeably absent from Respondents' submission is any opposition to Petitioner's showing of a Circuit split regarding the appropriate standard for pretrial due process claims. Nor do Respondents contest the importance of the pretrial due process right.

In *Baker* v. *McCollan*, 443 U.S. 137, 144 (1979), the Court held that a criminal suspect "could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards for the Fourth Amendment." To the contrary, "mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will, after the lapse of a certain amount of time, deprive the accused of 'liberty . . . without due process of law.'" Id. at 145.

As Mr. Hernandez set forth in detail in his petition for certiorari, the Circuits are divided on when the rule in *Baker* is triggered and liability can be imposed for illegal detention following an arrest.[1]

The Fifth and Fourth Circuits require the police to investigate information tending to suggest a suspect's innocence only when that information eliminates any and all threads of evidence tying plaintiff to the crime. See *Sanders* v. *English*, 950 F.2d 1152, 1164 (5th Cir. 1992); *Gay* v. *Wall*, 761 F.2d 175, 178-79 (4th Cir. 1985). In contrast, the First, Third and Eleventh Circuits have ruled that an officer has a duty to act – and thereby, liability can be imposed for an officer's failure to do so – when he or she learns of exculpatory evidence that undermines probable cause. *See Brady* v. *Dill*, 187 F.3d 104, 123 (1st Cir. 1999) (Pollak, J. concurring); *Thompson* v. *Olson*, 798 F.2d 552, 556 (1st Cir. 1986); *Wilson* v. *Russo*, 212 F.3d 781, 792 (3d Cir. 2000); *Cannon* v. *Macon County*, 1 F.3d 1558, 1563 (11th Cir. 1993). This more relaxed standard allows a plaintiff to prevail without showing the complete absence of evidence linking him to the crime; instead, a plaintiff must demonstrate that, at some point prior to trial, the available evidence diminished to a point where it became insufficient to support a reasonable belief that he was guilty. *Id.* Finally, the Second and Eighth Circuits place dispositive weight on the officers' misconduct and examine the materiality of the evidence ignored or withheld as a secondary condition. See *Russo* v. *City of Bridgeport*,

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[1] Respondents' contention that, if a pretrial due process right even exists, it arises under the Fourth Amendment, only serves to further highlight the need for this Court's guidance on this critical issue.

479 F.3d 196, 211-12 (2d Cir. 2007); *Amrine* v. *Brooks*, 522 F.3d 823, 833-35 (8th Cir. 2008); *Wilson* v. *Lawrence County*, 206 F.3d 946, 955-57 (8th Cir. 2001).

Just as Respondents fail to address in any meaningful way the legal issue presented for certiorari, they also never contest the importance of the pretrial due process right at issue. That concession is unsurprising. The pretrial due process right is the only remedy for detentions that are wrongfully prolonged (even though lawfully initiated) where the aggrieved person was either never brought to trial, or was tried and acquitted. In every such case, the existence of probable cause for the arrest bars a civil cause of action under the Fourth Amendment. And the lack of a trial, or the person's vindication at trial, precludes a due process claim for violation of his "trial rights," such as those under *Brady*. As a result, liability for a pretrial due process violation is the only way to remedy wrongful (and often lengthy) pretrial detentions. It is also the only way to incentivize police officers to release a detained person when no reasonable officer could believe that the available evidence provides sufficient cause to believe that person is guilty.

II. The Issue In The Petition Is Squarely Presented, Notwithstanding Respondents' Attempts To Mischaracterize The Factual Record.

Respondents suggest that regardless of the standard for a pretrial due process violation, Mr. Hernandez's petition should be denied because the police officers here neither manufactured evidence

nor committed any willful misconduct.[2] But Respondents cannot avoid this Court's review by muddying the waters in this fashion. As set forth in Mr. Hernandez's petition for certiorari, there is compelling evidence that Respondents not only fabricated a witness's identification of Mr. Hernandez, but also withheld from the prosecutor and Petitioner the lengths they had gone to in coercing the witness' identification. App. 77a-78a, 82a, 85a. Additionally, the record demonstrates that Respondents withheld that a second witness had given them information eviscerating the purported link between Petitioner and his co-defendant, App. 91a-92a, and that Respondents ignored leads pointing to the true perpetrator, Brandon Hamilton, who confessed to the murder and whose fingerprints were found at the scene. Id.[3]

As the district court found based on its review of the entire record, evidence suggests the whole investigation into the murder for which Mr. Hernandez was wrongfully convicted was a complete

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[2] Respondents spend a large portion of their brief addressing Mr. Hernandez's claims under *Brady* v. *Maryland*, 373 U.S. 83 (1963) and for an unduly suggestive identification. This lengthy detour is peculiar and irrelevant, as Mr. Hernandez's petition for certiorari does not challenge the Fifth Circuit's conclusions as to either of these claims. To the contrary, Mr. Hernandez' petition raises issues concerning the Fifth Circuit's standard for a reckless investigation claim and stresses that such a claim is a necessary recourse for those litigants for whom a *Brady* claim or other trial-based claim is foreclosed.

[3] It was only after a request by the state prosecutor that the police took Hamilton's statement at all. App. 57a n.10.

farce.[4] These facts are sufficient to show a violation of Mr. Hernandez's pretrial due process rights.

Respondents' alternative assertion – that recognizing a claim for the pretrial deprivation of due process would improperly expand substantive due process – is at best an argument for the merits, and not a reason to deny certiorari. Furthermore, this Court already has already recognized such a claim in *Baker* 443 U.S. at 144-45; see also *id.* at 148 (Blackmun, J., concurring). Granting this petition to clarify the standard for triggering the recognized duty to investigate in no way entails expanding the scope of substantive due process.

III. This Case Presents An Ideal Opportunity to Resolve the Circuit Split.

In contrast to Respondents' assertion to the contrary, Mr. Hernandez's case present an ideal opportunity to resolve the Circuit split regarding how to analyze a pretrial due process claim. Mr. Hernandez's case presents the very issue implicated by the split of authority: what standard the courts should use to analyze a pretrial due process claim. On the identical facts, Mr. Hernandez's claim would undoubtedly have survived summary judgment

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[4] With no leads, Respondents "on a hunch" extrapolated a name from a graffiti tag on the back of a strip mall, made a "recondite" (to borrow the district court's word) link from that tag to Mr. Hernandez because Mr. Hernandez allegedly once tried to shoplift a pair of jeans with a man whose nickname was close to but not the same as – the graffiti tag, and then improperly honed in on Mr. Hernandez as the purported perpetrator to the exclusion of all other suspects, including one who confessed to the crime and whose fingerprints were found at the crime scene. The whole "investigation" was truly that absurd.

under the standard followed by the First, Third and Eleventh Circuits' (requiring "probable cause to continue to detain") or the standard followed by the Second and Eighth Circuits' (focusing on the officers' misconduct).

CONCLUSION

Because of the significant confusion surrounding a pretrial due process claim and the attendant standard for that claim, as well as the importance of the Constitutional right at stake, this Court should grant Mr. Hernandez's petition for certiorari.

Respectfully submitted,

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